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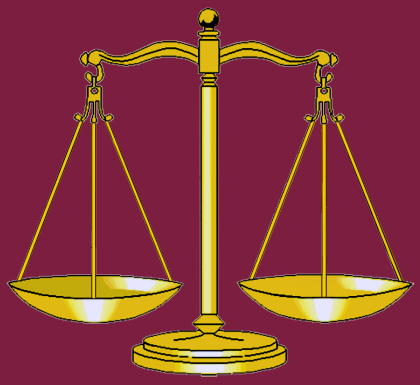

MILITARY LAW REVIEW

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Department of Army Pamphlet 27-100-219

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MILITARY LAW REVIEW

Volume 219 Spring 2014

CYBER WARFARE

GARY D. SOLIS*

I. Introduction

This discussion is out of date. Cyber warfare policy, techniques, and strategies, along with their associated laws of armed conflict (LOAC), are evolving so rapidly that it is difficult to stay current. A snapshot of the topic must suffice.

Much has been made of the revolution in LOAC necessitated by the advent of cyber warfare. But, "this is by no means the first time in the history of [LOAC] that the introduction of a new weapon has created the misleading impression that great legal transmutations are afoot…*viz*., the submarine."[1] Hannibal's elephants also elicited a similar erroneous impression. In fact, cyber warfare issues may be resolved in terms of traditional law of war concepts, although there is scant demonstration of its application because, so far, instances of cyber warfare have been rare. Nevertheless, although cyber questions are many, the law of war offers as many answers.

A threshold question: does existing LOAC apply to cyber issues? Yes, it does. The International Court of Justice (ICJ), in its 1996 *Nuclear Weapons* Advisory Opinion, notes that LOAC applies to "any use of

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[1] Yoram Dinstein, *Concluding Remarks*, *in* 89 INTERNATIONAL LAW STUDIES: CYBER WAR AND INTERNATIONAL LAW 276, 286 (Naval War C. 2013).

force, regardless of the weapons employed."[2] Whether a 500-pound bomb or a computer is used to effect death and destruction, a weapon is a weapon. The U.S. position is made clear in the 2011 *International Strategy for Operating in Cyberspace*, when it says, "The development of norms for State conduct in cyberspace does not require a reinvention of customary international law, nor does it render existing international norms obsolete. Long-standing international norms guiding State behavior – in times of peace and conflict – also apply in cyberspace."[3] Internationally, Article 36 of 1977 Additional Protocol I, requiring testing of new weapons and weapons systems for conformance with LOAC, illustrates that the law of war and international humanitarian law (IHL) rules apply to new technologies.

Defining many aspects of cyber warfare is problematic because there is no multi-national treaty that directly deals with cyber warfare. So far, many aspects of cyber war are not agreed upon. The law of war, as well as customary international law, lacks cyber-specific norms, and state practice in regard to the interpretation of applicable norms is slow to evolve. There is not even agreement as to whether cyber attack is one or two words. What can be said is that the *jus ad bellum* and *jus in bello* apply to cyber operations and it is safe to follow existing LOAC/IHL, as the United States' *International Strategy for Operating in Cyberspace* urges.

What is cyber warfare? It is not cybercrime—the use of computers in violation of domestic law for criminal purposes. In the United States, the *Computer Fraud and Abuse Act* defines Internet criminal acts.[4] European Union members of the NATO alliance have domestic laws implementing the 1995 E.U. Data Privacy Directive. Typical cybercrimes include access offenses, the impairment of data, misuse of devices, and interception of data offenses. Traditional criminal offenses such as fraud, child pornography, and copyright infringement may be facilitated through Internet access.[5] On an international level, cybercrime is addressed by the Council of Europe's 2001 *Convention on Cybercrime*, currently the only multinational treaty addressing the

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[2] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1995, I.C.J. 226–67, ¶ 39 (July 8).

[3] White House, *International Strategy for Cyberspace: Prosperity, Security, and Openness in a Networked World* 9 (May, 2011), *available at* http://www.slideshare.net/DepartmentofDefense/department-of-defense-strategy-for-operating-in-cyberspace.

[4] 10 U.S.C. § 1030 (2014).

[5] JONATHAN CLOUGH, PRINCIPLES OF CYBERCRIME (Cambridge Univ. Press 2010). .

criminal cyber problem. Nevertheless, cyber warfare and cyber crime should not be confused.

The word "cyber" is not found in the 1949 Geneva Conventions or the 1977 Additional Protocols. In common usage, "cyber" relates to computers and computer networks; not only the Internet but all computer networks in the world, including everything they connect with and control. Cyber warfare may be defined as "warfare waged in space, including defending information and computer networks, *deterring* information attacks, as well as denying an adversary's ability to do the same. It can include offensive information operations mounted against an adversary…"[6] Cyber warfare, then, includes defense, offense, and deterrence.

Cyber warfare may be engaged in by states, by agents of states, and by non-state actors or groups. It does not necessarily constitute terrorism, but it may, depending on one's definition of terrorism. The U.S. Federal Emergency Management Agency defines cyber terrorism as "unlawful attacks and threats of attack against computers, networks, and the information stored therein when done to intimidate or coerce a government or its people in furtherance of political or social objectives."[7] Cyber terrorism is a relatively minor threat today, but its potential is obvious.

II. The Internet as Battlefield

The importance of the Internet to military, government, commercial, and private interests requires no discussion. We daily read and hear of cyber breaches and cyber incidents involving critical national

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[6] STEVEN A. HILDRETH, CONG. RESEARCH SERV., RL30735, CYBERWARFARE 16 (2001) (emphasis in original). There is no definition of cyber warfare in Joint Publication 1-02, *Department of Defense Dictionary of Military and Associated Terms* (amended through October 15, 2013). Another definition is offered by the International Committee of the Red Cross (ICRC): "[M]eans and methods of warfare that consist of cyber operations amounting to or conducted in the context of an armed conflict within the meaning of IHL . . ." Cordula Droege, *Get Off My Cloud: Cyber Warfare, International Humanitarian Law, and the Protection of Civilians*, 94/886 INT'L REV. RED CROSS, 533, 538 (Summer, 2012).

[7] CLAY WILSON, CONG. RESEARCH SERV., RL32114, BOTNETS, CYBERCRIME, AND CYBERTERRORISM: VULNERABILITIES AND POLICY ISSUES FOR CONGRESS 3 (2008) (citations omitted).

infrastructure. China and Russia are usually identified as primary actors in those breaches.

China is particularly aggressive in its cyber intrusions and cyber theft of intellectual property.[8] China's cyber operations have been so frequent[9] and serious[10] that they have been the subject of repeated diplomatic,[11] even presidential,[12] entreaties and complaints.

Pursuant to a 1998 agreement, China has two network monitoring stations in Cuba, one located in the northernmost city of Benjucal to monitor U.S. Internet traffic, the other northeast of Santiago de Cuba to monitor U.S. Department of Defense (DoD) traffic.[13] Such penetrations are not particularly challenging to them, in part because China is familiar with U.S. Internet routers; most routers are brands of the U.S firm Cisco, but all brands of Cisco routers are made in China.

The Chinese People's Liberation Army's strategic cyber command is located in the 3rd General Staff Department, whose estimated 130,000 personnel focus on signals intelligence and defense information systems. Unit 61398 of the 2nd Bureau conducts the 3rd General Staff Department's cyber operations against America out of its Shanghai headquarters.[14] In recent years, Unit 61398 has been busy.

"Night Dragon" involved China's cyber theft of hundreds of terabytes of secret aspects of the then-new U.S. F-35 fighter from

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[8] Li Zhang, *A Chinese Perspective on Cyber War*, 94/886 INT'L REV. RED CROSS 801 (Summer 2012) (offering a different, far milder viewpoint).

[9] David E. Sanger & Nicole Perlroth, *Chinese Hackers Resume Attacks on U.S. Targets*," N.Y. TIMES, 20 May 2013, at A1; Edward Wong, *Hackers Find China is Land of Opportunity*," N.Y. TIMES, May 23, 2013, at A1; David E. Sanger, *In Cyberspace, New Cold War*, N.Y. TIMES, Feb. 24, 2013, at A1.

[10] David E. Sanger, *China's Military is Accused by U.S. in Cyberattacks*, N.Y. TIMES, May 7, May 2013, at A1; Ellen Nakashima, *Key U.S. Weapon Designs Hacked, Officials Point Finger at China*, N.Y. TIMES, May 28, 2013, at A1; Ernesto Londoño, *Pentagon Accuses China of Hacking*, N.Y. TIMES, May 7, 2013, at A6.

[11] David E. Sanger & Mark Landler, *U.S. and China Will Hold Talks About Hacking*, N.Y. TIMES, June 2, 2013, at A1; Mark Lander & David E. Sanger, *U.S. Demands Chinese Block Cyberattacks*, N.Y. TIMES, Mar. 12, 2013, at A1.

[12] Philip Rucker, *Obama Warns Xi on Continued Cybertheft*, N.Y. TIMES, June 9, 2013, at A5.

[13] RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR 58 (2010).

[14] MANDIANT INTELLIGENCE CENTER REPORT: ADVANCED PERSISTENT THREAT 1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS (2013) (widely available on-line).

Lockheed Martin's data storage system. That theft began in 2007 and continued undiscovered through 2009.[15]

In September 2011, a virus of unknown (or undisclosed) origin infected classified U.S. Air Force drone control stations at Creech Air Force Base, in Nevada. The virus was repeatedly wiped off and, just as often, promptly returned. It exhibited no immediate effects and Predator and Reaper missions in Afghanistan and Iraq continued uninterrupted. The Air Force said, "We think it's benign. But we just don't know."[16]

In 2010, the Vice-Chairman of the Joint Chiefs of Staff noted that, "penetrations of Pentagon systems were efforts to map out U.S. government networks and learn how to cripple America's command-and-control systems as part of a future attack."[17]

Many DoD computer systems in the Pentagon that involve classified material are safeguarded from intrusion by security devices referred to as "tokens." Access to Pentagon computers requires the user's password and a random number that is provided by the user's token. The token is a small key-shaped thumb-drive-like object manufactured by several civilian information security companies. The token generates a new random six-digit number every sixty seconds. To unlock classified network computers, users insert their token into their computer's USB port and enter the number then showing in a small window on the token. In March 2011, "an extremely sophisticated"[18] cyber attack by "a foreign intelligence service"[19] hacked the computer system of RSA Security, a major civilian information security company, and gained data pertaining to the manufacture and the capabilities of the tokens that RSA Security supplies the Pentagon. "RSA has tens of millions of dollars worth of contracts across the federal government. Agencies with large contracts include . . . the Defense Department and its service branches."[20]

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[15] CLARKE & KNAKE, *supra* note 13, at 233; Jason Healey, *A Brief History of US Cyber Conflict*, *in* JASON HEALEY, ED., A FIERCE DOMAIN: CONFLICT IN CYBERSPACE, 1986 TO 2012, at 14, 68 (Cyber Conflict Stud. Ass'n 2013).

[16] *Wired*, Oct. 7, 2011, *available at* http://www.wired.com/dangerroom. *See also Virus Hits Networks Used for Drone Flights*, WASH. POST, OCT. 9, 2011, at A7.

[17] J.P. London, *Made in China*, U.S. NAVAL INST. PROCEEDINGS, Apr. 2011, at 54, 56. The then-Vice-Chairman was General James Cartwright.

[18] Ellen Nakashima, *Agencies Probe Breach at Information Security Firm*, WASH. POST, Mar. 24, 2011, at A2.

[19] Thom Shaker & Elisabeth Bumiller, *After Suffering Damaging Cyberattack, the Pentagon Takes Defensive Action*, N.Y. TIMES, July 15, 2011, at A-6.

[20] Nakashima, *supra* note 18.

Rather than attacking DoD computers directly, the March 2011 cyber attack targeted the firm that provided cyber security for the computers. Three months later, "confirming the fears of security experts about the safety of the . . . tokens,"[21] hackers using the stolen RSA token data attacked Lockheed Martin, one of the nation's largest defense contractors and the maker of fighter aircraft and satellites. (This is not the same Lockheed Martin attack mentioned above.) Soon thereafter, the DoD admitted that the March 2011 cyber attack was "one of its worst digital attacks in history [losing] 24,000 Pentagon files during a single intrusion."[22] A Deputy Secretary of Defense confirmed "that over the years crucial files stolen . . . have included plans for missile tracking systems, satellite navigation devices, surveillance drones and top-of-the-line jet fighters."[23] "Bad as it was to lose secrets, that wasn't the worst threat from government hacking. Once a system has been compromised, the attacker can choose its fate; he can keep the system alive and milk it for its secrets; or he can kill it—shut it down for as long as he likes."[24]

China is hardly alone it its cyber boldness. Shortly after midnight on 6 September 2007, seventy-five miles inside Syria, at least four Israeli F-15 Eagle and F-16 Falcon fighter-bombers attacked and destroyed their Syrian target. The U.S. government had known the attack was planned and did not oppose it.[25] Although there were no casualties, it "was, by almost any definition, an act of war. But . . . nothing was heard from the government of Israel. . . . It was not until October 1st that Syrian President Bashar Assad . . . acknowledged that the Israeli warplanes had hit their target, which he described as an 'unused military building.'"[26] In fact, the Israelis had bombed into rubble a partially completed gas-cooled, graphite-moderated nuclear reactor, designed and built with years of assistance from North Korea. A month after the attack, Benjamin Netanyahu, then the Israeli Governments' opposition leader, admitted to

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[21] Christopher Drew, *Stolen Data Is Tracked to Hacking at Lockheed*, N.Y. TIMES, June 4, 2011, at B-1.

[22] Shaker & Bumiller, *supra* note 19. Other sources say the attack was on a defense contractor's computer system (e.g., Ellen Nakashima, *U.S. Cyber Approach 'Too Predictable*', WASH. POST, July 15, 2011, at A2).

[23] *Id.*

[24] STEWART BAKER, SKATING ON STILTS: WHY WE AREN'T STOPPING TOMORROW'S TERRORISM 20 (Hoover Inst. Press 2010).

[25] GEORGE W. BUSH, DECISION POINTS 420–22 (2010) and much more revealing, ROBERT M. GATES, DUTY: MEMOIRS OF A SECRETARY AT WAR 171–77 (2014),.

[26] Seymour M. Hersh, *A Strike in the Dark*, NEW YORKER, Feb. 11 and 18, 2008, at 58.

the strike.[27] Post-attack photographs of the target site released by the United States showed mangled control rods and what appear to be elements of the reactor cooling system.[28] Unaddressed by press reports of the bombing was how Israeli warplanes managed to penetrate Syrian airspace, conduct an attack, and escape, all without a shot fired at them by Syria's modern air defense system. The answer, related by Richard Clarke, former U.S. National Coordinator for Security, Infrastructure Protection, and Counterterrorism, is an example of a cyber attack that prepped a battlefield:

> Israel had "owned" Damascus's pricey air defense network the night [of the attack]. What appeared on [Syrian] radar screens was what the Israeli Air Force had put there, an image of nothing . . . Syrian air defense missiles could not have been fired because there had been no targets in the system for them to seek out. Syrian air defense fighters could not have scrambled . . . because their Russian-built systems required them to be vectored toward the target aircraft by ground-based controllers. The Syrian . . . controllers had seen no targets.[29]

Israel screened its kinetic attack with a cyber attack that cloaked Syrian air defense radar screens with a false image of a clear sky. Clarke continues, "Whatever method the Israelis used to trick the Syrian air defense network, it was probably taken from a playbook they borrowed from the [United States]"[30]

These examples did not involve armed conflict in the traditional sense. They illustrate the danger cyber warfare poses for the national defense of a victim state, and the potential degradation of military command and control systems that could result in the death or wounding of combatant victims of a cyber attack.

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[27] Steven Lee Myers & Steven Erlanger, *Bush Declines to Lift Veil of Secrecy Over Israeli Airstrike in Syria*, N.Y. TIMES, Sept. 21, 2007, at A12.
[28] David E. Sanger, *Bush Administration Releases Images to Bolster Its Claim About Syrian Reactor*, N.Y. TIMES, Apr. 25, 2008, at A5.
[29] CLARKE & KNAKE, *supra*, note 13, at 5.
[30] *Id.* at 8.

III. *Jus ad Bellum* and *Jus in Bello* in Cyber Warfare

In considering cyber warfare, one must be aware of the *jus ad bellum*, the law applicable to the initial resort to armed force, before considering the application of the *jus in bello*. That is because cyber attacks will occur when no armed conflict is, or has been, in progress between the victim state and attacking state, or its proxies. Whether a cyber attack is state-initiated, state-sponsored, or conducted by independent non-state actors, an initial question is not the applicable LOAC/IHL (the *jus in bello*), but whether it is lawful to initiate an armed response (the *jus ad bellum*) in the first place.

Jus ad bellum, sometimes thought of as "Just War theory," has a long and often disreputable history.

> Attempts to place war within a legal framework date back to the earliest articulation of the theory of "just war," by virtue of which war was considered a "just" response to illegal aggression. Ultimately, it was a means to restore the rights offended by the aggressor as well as a means of punishment. By relying on the validity of the cause for war, this doctrine brought into place a legal regime that reflected "the belligerent's right to resort to force."[31]

In the fifth century B.C., China "recognized rules stipulating that no war should begin without just cause. . . ."[32] Xenophon, in *Cyropaedia* (4th century B.C.), wrote about when to wage war, as did the Roman, Cicero, in his 1st century B.C. work, *De Republica*. Early Christians, notably Saints Ambrose and Constantine, developed Just War doctrine. "The central notion here is that the use of force requires justification—the presumption is always against violence—but violence may be permitted to protect other values."[33] Thomas Aquinas and Francisco de Vitoria carried Just War doctrine from the Roman Empire into the Dark Ages.

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[31] Jasmine Moussa, *Can* jus ad bellum *Override* jus in bello? *Reaffirming the Separation of the Two Bodies of Law*, 872 INT'L REV. RED CROSS 963, 966 (Dec. 2008).
[32] PAUL CHRISTOPHER, THE ETHICS OF WAR AND PEACE 8 (2d ed. 1994).
[33] *Id.* at 23.

Hugo Grotius, looking to natural law, provided a sharper focus to Just War theory in his 1625 work, *On the Law of War and Peace*. "Modern Just War theory recognizes as many as eight conditions that are necessary to justify a nation's resorting to arms. Grotius . . . accepts only six."[34] In Grotius's teaching, there first must be a just cause prior to resorting to arms; this forbids wars of anticipation. Second, the positive aims of going to war must be proportional to the evil that the war itself will cause. Next, there must be a reasonable chance of success, thus rejecting futile or suicidal armed resistance. Fourth, wars must be publicly declared, allowing public debate of the wisdom of going to war. Only a legitimate authority may declare war; rogue commanders may not take a state to war. Finally, war must always be the last resort, undertaken only if the other five preconditions have been met and no other solution remains. These six preconditions may be debated but, basically, they encompass classic Just War theory, traditionally termed "*jus ad bellum*"—the circumstances in which states may rightfully resort to armed force.

Today, Just War theory has largely been overtaken by the United Nations Charter, which provides international legislation, as it were, mandating when states may lawfully resort to force.

"The reason for adopting a rigorous distinction between *jus ad bellum* and *jus in bello* is the need for a bright-line cleavage that is workable in the field of battle. Soldiers do not have to think about who started the war. They know that, regardless of who started the conflict, certain means of warfare are clearly illegal."[35] *Jus ad bellum* theory provides a background for deciding how to respond to attacks, including cyber attacks, and how they may lawfully be countered.

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[34] *Id.* at 82. Some theorists add a seventh requirement, one rejected by Grotius, that a war must be waged for the ends of peace.

[35] GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY: WHEN FORCE IS JUSTIFIED AND WHY 21–22 (Oxford Univ. Press 2008). There is a view that if the war is itself unlawful, any offensive act by a soldier of the offending state is similarly unlawful and the actor-soldier therefore is a criminal. *See, e.g.*, Thomas Nagel, *War and Massacre*, 1 PHIL. & PUB. AFF. 123 (1972) (discussing U.S. soldiers in the Vietnam conflict. This position is clearly a minority view).

IV. What Constitutes a Cyber Attack?

The United States initiates offensive cyber warfare operations, of course.[36] "DoD officials reportedly stated that the United States could confuse enemies by using cyber attack to open floodgates, control traffic lights, or scramble the banking systems in other countries."[37] (Such a confident statement brings to mind the Marine Corps tactical adage that when the enemy is in range, so are you.) But does every offensive cyber operation constitute a cyber attack?

Some civilian and government computer networks are so essential to a nation's well-being that the state will protect them at almost any cost. In the United States, military and civilian computer networks relating to communications, transportation, power, water, and electrical systems, gas and oil storage, as well as banking and finance systems, are referred to as "critical national infrastructure."[38] Because they are vital to the functioning of the state, computer network attacks (CNAs) against the critical national infrastructure are considered more serious than those against many significant military objectives.

In May 2007, Estonia suffered massive cyber intrusions in the form of rolling CNAs, widely believed to have been initiated by Russian actors using as many as a million bots rented from scores of nations as distant as the United States.[39] Estonia's critical national infrastructure was brought to a standstill, apparently by Russian civilian hackers encouraged and/or coordinated by their government.[40] Then, in August 2008, the first cyber attack that coincided with an armed conflict occurred when, shortly before attacking Georgia by kinetic means, Russia overwhelmed Georgian government websites with distributed-denial-of-service attacks. The next year, in mid-2009, the American-

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[36] William Matthews, *Pentagon Expanding Domestic Cyber Role*, MARINE CORPS TIMES, Nov. 1, 2010, at 12 (reporting an agreement between the Department of Homeland Security and the Department of Defense to share DoD's electronic spying experience and expertise).

[37] Wilson, *supra* note 7, at 18.

[38] Executive Order 13,010 (17 July 1996) (describing critical national infrastructure as including "telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services . . . and continuity of government.").

[39] A "bot," also called a "zombie," is a computer in which malware has been entrenched and, akin to a human "sleeper agent," lays inactive until triggered by the attacker. A network of bots constitutes a "botnet."

[40] Healey, *supra* note 15, at 68.

Israeli Stuxnet worm first appeared, eventually attacking and destroying a third of Iran's centrifuges, crucial to the country's nuclear enrichment program.

An armed attack by frontal assault, naval gunfire, or aerial bombing make clear that a kinetic attack (one using "traditional" explosive weapons) is underway. Cyber warfare, however, sometimes allows room to question if an attack is even occurring and whether LOAC/IHL applies. If a college student hacks a Blueland military command computer network, how is the network's Command Duty Officer (CDO) to know the intrusion is not the precursor of an all-out Redland cyber or kinetic attack? Further complicating the CDO's calculation is her inability to immediately know who mounted the intrusion, or from where it originated.

The distinction between the terms, "cyber *intrusion,*" and "cyber *attack*," is meaningful: in LOAC/IHL, a cyber *attack* may raise the lawful right to respond with armed force. A cyber *intrusion,* or any other cyber operation short of an attack, does not.

What, then, constitutes an "attack"? Additional Protocol I, Article 49.1 explains, "'Attacks' means acts of violence against the adversary, whether in offense or in defense." The term "acts of violence" appears to be applicable to cyber attacks. Additional Protocol I's *Commentary* notes, "It is quite clear that the meaning given [the word 'attack' in Article 49.1] is not exactly the same as the usual meaning of the word. In the larger dictionaries the idea of instigating the combat and striking the first blow is predominant . . . . [C]losest to the meaning of the term as used in the Protocol [is], 'to set upon with hostile action.'"[41] That fairly describes a cyber attack.

Further defining "attack," the *Commentary* asks whether the laying of landmines constitutes an attack: "The general feeling [of the Protocol Drafting Committee] was that there is an attack whenever a person is directly endangered by a mine laid . . . . [A]n attack is unrelated to the concept of aggression or the first use of armed force; it refers simply to the use of armed force to carry out a military operation . . . ."[42] Significantly for cyber warfare, this indicates that when an individual is

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[41] YVES SANDOZ, CHRISTOPHE SWINARSKI & BRUNO ZIMMERMAN, EDS., COMMENTARY ON THE ADDITIONAL PROTOCOLS—1977, ¶ 1879, at 603 (1987).
[42] *Id.* ¶¶ 1881–82, at 603.

"directly endangered" it constitutes an attack. "An 'armed attack,'" adds a European writer, "can be committed by means of conventional weapons . . . but also by unconventional means . . . Arguably, the same would be true in the hypothetical case of a so-called 'computer network attack' (CNA) were it to cause fatalities or large-scale property destruction . . . ."[43]

Such reference to fatalities and property destruction suggests an objective guide for determining when a cyber operation constitutes a cyber attack:

> Some States, including the [United States], have adopted a "results test" as a way of determining whether IO [cyber information operations] constitute a use of force or an armed attack. Such a test attempts to adapt traditional State-centric kinetic concepts of the use of force in assessing whether the deliberate actions of an aggressor cause injury, death, damage, and destruction to the military forces, citizens, and property of a State, such that those actions are likely to be judged by applying traditional *jus ad bellum* and *jus in bello* principles.[44]

Several definitions of cyber attack are available in scholarly and military writings. "[T]he term 'cyber attack' is regularly used in the mass media to denote an extremely wide range of cyber conduct, much of which falls below the threshold of an 'armed attack' as understood in the *jus ad bellum,* or an attack as defined in LOAC."[45]

For either international or non-international armed conflicts, one excellent definition of cyber *attack* is: a trans-border cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons, or damage or destruction to objects.[46]

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[43] TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER 176 (Cambridge Univ. Press 2010).

[44] TERRY D. GILL & DIETER FLECK, THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS ¶ 4.01.3, at 52–53 (Oxford Univ. Press 2010).

[45] Laurie R. Blank, *International Law and Cyber Threats from Non-State Actors*, 89 INT'L L. STUD. 406, 437 (2013).

[46] MICHAEL N. SCHMITT, TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE Rule 30, at 106 (Cambridge Univ. Press, 2013). A trans-border element is added by, *id.* Rule 13, at 54. In agreement, Droege, supra note 6, at 546. *See also* Michael N. Schmitt, *Wired Warfare: Computer Network Attack and* Jus in Bello, 846 INT'L REV. OF THE RED CROSS 365, 373 (June 2002). As with so many aspects of

What extent of death, injury, damage, or destruction is required to constitute a cyber attack? The law of armed conflict does not specify. Cyber theft, cyber intelligence gathering, and cyber intrusions that involve brief or periodic interruption of non-essential cyber services, do not qualify as cyber attacks, however.[47]

> [The definition of cyber attack] should not be understood as excluding cyber operations against data (non-physical entities, of course) from the ambit of the term attack. Whenever an attack on data results in the injury or death of individuals or damage or destruction of physical objects, those individuals or objects constitute the "object of attack" and the operation therefore qualifies as an attack.[48]

An attack is determined by the violence of its consequences, not the violence of its means.

Although there is no internationally agreed-upon definition, cyber *intrusions* are cyber operations that do not rise to the level of a cyber *attack*. Cyber intrusions may be described as covert actions employing small-scale operations against a specific computer, computer system, or user, whose individual compromise would have significant value, such as a government's nuclear command and control system.[49] The difference is that intrusions do not cause death, wounding, destruction, or physical damage.

What if there have been a series of minor cyber intrusions from a common source, none of them individually rising to the threshold of an attack? Can they, in the aggregate, rise to an armed attack? Only if the related incidents, taken together, rise to the requisite scale and effect.

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cyber warfare, there is no broad agreement as to what constitutes an attack. "The unsatisfactory answer to 'what is a cyber attack?' is: exactly what we decide is a cyber attack at a given time under given circumstances that cannot be determined in advance." Colonel Gary D. Brown, *The Wrong Questions About Cyberspace*, 217 MIL. L. REV. 214, 221 (Fall 2013).

[47] SCHMITT, *supra* note 46, at 55.

[48] *Id.* Rule 30.6, at 107–08.

[49] Robert D. Williams, *(Spy) Game Change: Cyber Networks, Intelligence Collection and Covert Action*, 79-4 GEO. WASH. L. REV. 1162, 1185 (June 2011) (citing NAT'L RESEARCH COUNCIL, TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES § 4.2.1, at 194 (William A. Owens et al., eds., 2009).

What about that Blueland Command Duty Officer whose military computer network was hacked by a college student? The resulting damage, if any, will likely have been inflicted by the time or before she became aware of the hack; at the moment of awareness of the intrusion (or attack), all she knows is there has been a cyber operation involving penetration of the network. She will alert her superiors that the system may have been breached, although she would not know how, by whom, from where, or to what extent. This illustrates that, absent such specific knowledge, one cannot know whether an attack had been executed.

V. A Cyber Attack Is a Use of Armed Force

Nowhere is the term "use of force" clearly defined. The UN Charter Article 2(4) provides, "All members [of the UN] shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State . . . ."[50] Exceptions are use of force authorized by the Security Council, and self-defense pursuant to Article 51. Customary international law also applies the prohibition to non-UN members, although *not* to non-state actors or organized armed groups.

Whether a cyber attack constitutes a use of force matters because UN Charter Article 51 requires that an armed counter-attack, if any, be a response not to a use of force, but to a use of *armed* force. The initial question, then, is whether cyber attacks constitute a use of force and, if so, the second question: are they a use of *armed* force?

> Ultimately, it is the victim state that determines whether . . . an act was use of force and what response it will take; however, these decisions are always subject to judgment by the international community.[51]

Professor Michael Schmitt notes, "Since the advent of cyber operations, States and scholars have struggled mightily to define the threshold at which an act becomes a 'use of force.' The interpretive dilemma lies in the application of the norm to cyber operations that . . . produce severe

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[50] U.N. Charter art. 2(4).

[51] Lieutenant Commander Brian Evans & Rick Lanchantin, *Lifting the Fog on Cyber Strategy*, U.S. NAVAL INST. PROCEEDINGS, Oct. 2013, at 66, 68.

non-physical consequences."[52] The UN Charter offers no defining criteria. While the required degree of injury or damage remains unresolved, a cyber *intrusion* (a cyber operation short of an attack) into another state's cyber systems would not constitute a use of force, nor would it violate international law.[53] The ICJ, rejecting a narrow interpretation of "use of force," held in the *Nicaragua* case that "scale and effects" are to be considered in determining if particular actions amount to an attack.[54] "In other words, 'scale and effects' is a shorthand term that captures the quantitative and qualitative factors to be analyzed in determining whether a cyber operation qualifies as a use of force."[55] In regard to the required threshold of harm:

> [A]ny cyber operation causing greater than *de minimus* damage or injury suffices . . . . In particular, operations that non-destructively target critical infrastructure may come to be viewed by States as presumptive use of force. The same approach might be applied to military targets or State systems designed to provide cyber security. Another possibility is that States will begin to treat data destruction as the functional equivalent of physical destruction for use of force characterization purposes whenever the destruction of the data severely disrupts societal, economic or governmental functions.[56]

A cyber attack, as opposed to a cyber intrusion, constitutes a "use of force" if undertaken by a state's armed forces, intelligence services, or a private contractor whose conduct is attributable to the state, and its scale and effects are comparable to non-cyber operations that rise to a level of a use of force.[57]

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[52] Michael N. Schmitt, *The Law of Cyber Warfare:* Quo Vadis*?*, 25-1 STAN. L. & POL. REV. 9 (forthcoming 2014).
[53] SCHMITT, *supra* note 46, Rule 10.8, at 44.
[54] Military and Paramilitary Activities in and Against Nicaragua (Merits), 1986 I.C.J. 14, ¶ 195 (June 27) (Judgment),.
[55] SCHMITT, *supra* note 46, Rule 11.1, at 46.
[56] Schmitt, *supra* note 52, at 10-11. Professor Schmitt's statement includes attacks on the critical national infrastructure as constituting a use of armed force.
[57] For a (very brief) contrary view, see Evans & Lanchantin, supra note 51, at 68.

VI. Cyber Attacks Are Armed Attacks

United Nations Charter Article 51 and customary law specify that only an armed attack justifies armed response in self-defense by the victim state. If the attacker's use of force does not amount to an armed attack, the victim state may bring the matter before the Security Council, or it may employ non-forcible countermeasures. "But it cannot use counterforce in self-defense."[58]

An attack mounted without actual physical force of arms may give rise to lawful self-defense by a victim state, whether the attack be kinetic or electronic. It is "unreasonable to argue that because a [computer network attack] does not physically destroy the object of attack in the traditional sense, it can never amount to a use of force or an armed attack."[59] Moreover, "[t]he choice of arms by the attacking State is immaterial."[60] Cyber attacks are singular in their ability to kill and wound, and to destroy or damage civilian and military objects without the use of a traditional kinetic weapon. That includes attacks on the critical national infrastructure.

> The mere manipulation of a banking system or other manipulation of critical infrastructure, even if it leads to serious economic loss, would probably stretch the concept of armed force. . . . But the disruption of such vital infrastructure as electricity or water supply systems, which would inevitably lead to severe hardship for the population if it lasted over a certain period, even if not to death or injury, might well have to be considered as armed force . . . . [T]hey are precisely the kind of severe consequences from which IHL seeks to protect the civilian population.[61]

"The right of self-defence may be triggered by an armed attack or a clear threat of an impending attack," Professor Yoram Dinstein notes,

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[58] Dinstein, *Concluding Remarks*, *supra* note 1, at 276, 278.
[59] Eric Talbot Jensen, *Computer Attacks on Critical National Infrastructure: A Use of Force Invoking the Right of Self-defense*, 38 STAN. J. INT'L L. 207, 222 (2002).
[60] Yoram Dinstein, *War, Aggression and Self-Defence* 196 (Cambridge Univ. Press, 4th ed., 2005).
[61] Droege, *supra* note 6, at 548. Executive Order 13,010, specifically includes banking and finance systems in its definition of critical infrastructure. *See supra* note 37.

> [W]henever a lethal result to human beings, or serious destruction to property, is engendered by an illegal use of force by State A against State B, that use of force will qualify as an armed attack. The right to employ counter-force in self-defense against State A can then be invoked by State B . . . .[62]

Dinstein continues,

> From a legal perspective, there is no reason to differentiate between kinetic and electronic means of attack. A premeditated destructive [CNA] can qualify as an armed attack just as much as a kinetic attack bringing about the same . . . results. The crux of the matter is not the medium at hand (a computer server in lieu of, say, an artillery battery), but the violent consequences of the action taken.[63]

A traditional physical assault by force of arms is not required for the act to constitute an armed attack. For example, during a period of peace, a surprise attack employing biological or chemical weapons would be viewed as an armed attack and constitute the initiation of an armed conflict. The 9-11 attacks on the United States by al Qaeda initiated an armed conflict, even though a traditional armed enemy force was not involved. A cyber attack that kills, wounds, or destroys constitutes an armed attack, just as kinetic weapons causing the same results, would be considered an armed attack.

VII. Cyber Attacks and the Initiation of Armed Conflict

International norms guiding state behavior apply equally in cyberspace. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has held that "an armed conflict exists whenever there is a resort to armed force between States, or protracted armed violence between governmental authorities and organized armed

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[62] Yoram Dinstein, *Computer Network Attacks and Self-Defense*, *in* Michael N. Schmitt & Brian T. O'Donnell, eds., *International Law Studies*, 76 COMPUTER NETWORK ATTACK & INT'L L. 99, 100 (Naval War C. 2002).
[63] *Id.* at 103.

groups."[64] Cyber attacks may accordingly initiate either international or non-international armed conflicts.

> [International] humanitarian law principles apply whenever computer network attacks can be ascribed to a State . . . and are either intended to cause injury, death, damage or destruction . . . or such consequences are foreseeable . . . By this standard, a computer network attack on a large airport's traffic control system by agents of another State would implicate humanitarian law. So too would an attack intended to destroy oil pipelines by surging oil through them after taking control of computers governing flow . . . or using computers to trigger a release of toxic chemicals from production and storage facilities.[65]

De minimus damage or destruction, as might be caused by an attack by an armed opposition group unsupported by a sponsoring state, probably could not meet the threshold of destruction required to initiate armed conflict. Presume an intended cyber attack by a Redland armed opposition group targeting Blueland submarine navigation systems. The group's intent is to destroy the subs' ability to navigate while submerged, causing their destruction. Instead, the submarines simply surface, bypass their damaged navigation systems patching their function into alternate systems. Yes, it was a cyber attack: a trans-border offensive cyber operation, expected to cause the destruction of significant military objects. The effect, however, was (arguably) *de minimus*, causing the inconsequential surfacing of submarines to deal with the damage. Applying an effects test, the intended cyber attack would not be sufficient to initiate a non-international armed conflict. Were the attacker the state of Redland, rather than an armed opposition group, the *de minimus* result would be the same: insufficient to initiate an international armed conflict.

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[64] Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 12, 1995).

[65] Sean Watts, *Combatant Status and Computer Network Attack*, 50-2 VA. J. OF INT'L L. 391, 394 (2010) (emphasis in original). *See also* SCHMITT, *supra* note 46, Rule 30, at 106–07 ("The crux of the notion lies in the effects that are caused . . . For instance, a cyber operation that alters the running of a SCADA [supervisory control and data acquisition] system controlling an electrical grid and results in a fire qualifies. Since the consequences are destructive, the operation is an attack.").

Can a CNA trigger an international armed conflict in the absence of a kinetic use of force? The ICRC cautiously responds, "The answer depends on whether a computer network attack is (1) attributable to the state and (2) amounts to a resort to armed force, a term that is not defined under [international humanitarian law]."[66] Although not squarely responsive to the question, the ICRC's response highlights that a CNA initiated by non-affiliated non-state actors cannot initiate an international armed conflict. It is clear, however, that a state-initiated CNA, even without a kinetic element, may initiate an international armed conflict.

VIII. Cyber Attacks and Non-State Actors

From whom must a cyber attack emanate in order to trigger a state's right of self-defense? Cyberspace affords "the individual the same ability to deliver effects that a nation state possesses. As a result, the applicability of LOAC may be questionable if an act is attributable to an individual, potentially making the act illegal but not an act of war, or if the nation state claims the offender was operating outside the cognizance of the government."[67] Attacks by a state's armed forces are of course within the purview of UN Charter Article 51 relating to self-defense. That is also true if similar acts by non-state actors are attributable to a sponsoring state, although attribution can be a difficult cyber issue, in part because "geography is irrelevant to the issue of attribution. Non-State actors may, and likely often will, launch a cyber operation from outside territory controlled by the State to which the conduct is attributable."[68]

A question raised by the ICJ is whether non-state cyber actors, or an armed opposition group acting without state sponsorship or control, can initiate a cyber attack that raises a victim state's right to armed self-defense, even though nothing in Article 51 limits self-defense to armed attacks by a state, or by state-sponsored groups. The ICJ has twice ruled that self-defense is limited to instances of states attacked by other states. In its 2004 *Palestinian Wall* advisory opinion, self-defense against other than an attacking state is dismissed by the court in a single paragraph:

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[66] Droege, *supra* note 6, at 543.
[67] Evans & Lanchantin, *supra* note 51, at 68.
[68] Michael N. Schmitt, *Below the "Threshold Cyber Operations: The Countermeasures Response Option and International Law*, 54 VA. OF INT'L L. (forthcoming 2014).

> Article 51 . . . recognizes the existence of an inherent right of self-defense in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it [emanating from the Occupied Palestinian Territories] are imputable to a foreign State . . . and therefore Israel could not in any case invoke those [post-9/11 UN Security Council] resolutions in support of its claim to be exercising a right of self-defense.[69]

A year later, the ICJ again rejected self-defense in response to attacks by non-state actors[70] and reaffirmed the restrictive state-centric approach enunciated in its pre-Taliban, pre-al Qaeda, 1984 *Nicaragua* opinion. That decision requires that an armed opposition group's actions be attributable to a sponsoring state before another state's right to self-defense arises. Absent such attribution, the group's war-like acts cannot form a valid basis for victim-state armed self-defense. These two opinions, although criticized,[71] hold that the self-defense provisions of UN Charter Article 51 are of "no relevance" to attacks by non-state actors because that provision applies only "in the case of armed attack by one State against another State . . . ."[72]

Through its two decisions, "the Court circumscribed the applicability of the international legal order to certain actors, leaving others unregulated despite their actual participation in activities that affect world public order."[73] The two holdings were soon questioned, however. "[A] majority of scholars accept that a strict insistence on State imputability is no longer tenable."[74] Another commentator declared, "the Court's restrictive approach is increasingly out of touch with state

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[69] Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory, The Wall Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9).

[70] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), 2005 I.C.J. 116–20, ¶¶ 132, 146, 147 (Dec. 19).

[71] *See, e.g.*, Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An* Ipse Dixit *from the ICJ?* 99-1 AM. J. INT'L L. 62, 64 (Jan. 2005) ("First, nothing in . . . Article 51 . . . requires the exercise of self-defense to turn on whether an armed attack was committed directly by, or can be imputed to, another state . . . [and] the Security Council has repeatedly found that the conduct of nonstate actors can be a threat to international peace and security.").

[72] *Legal Consequences of the Construction of a Wall*, *supra* note 68, ¶ 139.

[73] Jacob Katz Cogan, *Current Developments: The 2010 Judicial Activity of the International Court of Justice*, 105–03 AM. J. INT'L L. 477, 486 (July 2011).

[74] RUYS, *supra* note 43, at 487.

practice."[75] Professor Laurie Blank adds, "State practice in the aftermath of the 9/11 attacks provides firm support for the existence of a right of self-defense against non-State actors, even if unrelated to any State."[76] Today, the Court's view of limited applicability is essentially disregarded.

A non-state cyber attacker would be an unprivileged belligerent, a civilian taking a direct part in hostilities.[77] "Some examples of cyber acts that could constitute direct participation in hostilities include writing and executing malicious code, launching distributed denial of service attacks, providing malware or other cyber tools to a party to the conflict . . . ."[78]

What if attacking non-state actors are not state-sponsored, and the group lacks the necessary organizational character to constitute an armed opposition group? Or if a single unaffiliated actor were to initiate a cyber attack? What if the attacking non-state actor(s) lack, in the words of the ICTY, a "headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms"[79] 'or, in the case of cyber attackers, the ability to formulate and distribute electronic instructions and orders, or control the electronic means of attack? What if the hackers are no more than an unorganized aggregate, affiliated only in philosophy, united only in their determination to cripple or destroy government institutions? Lacking the organization to constitute an armed opposition group, they could not be a party and there can be no armed conflict in the sense of either common Article 2 or 3. "Cyber operations conducted by individuals or by unorganized groups of 'hackers,' no matter how intense . . . cannot qualify as a non-international armed conflict."[80] The attackers would be criminals to be captured and prosecuted under the domestic law of the state wherein their attack originated.

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[75] Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post 9/11*, 105-2 AM. J. INT'L L. 244, 261 (Apr. 2011).
[76] Blank, *supra* note 45, at 413.
[77], Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51.3, June 8, 1977, U.N. Doc. A/32/144 [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 13.3, U.N. Doc. A/32/144 [hereinafter Protocol II]
[78] Blank, *supra* note 45, at 430.
[79] Prosecutor v. Limaj, et al., Case No. IT-03-66-T, Judgment, ¶ 90 (In't' Crim. Trib. for the Former Yugslovia Nov, 30, 2005).
[80] Schmitt, *supra* note 52, at 19.

Any counter-attack against non-state actors, or armed opposition groups, would have to satisfy the requirements of distinction, military necessity, and proportionality, discussed, below, in a cyber context.

IX. Not All Cyber Intrusions Are Cyber Attacks

Some cyber intrusions, such as those initiated for purposes of cyber theft, intelligence gathering, espionage, or periodic disruptions or denials of nonessential cyber services,[81] may be mistakenly viewed as attacks. "[I]t is essential to differentiate between actors with 'war' intentions and those with malicious or criminal intentions, especially when assessing the appropriate response."[82]

> Absent a conventional attack component, manipulation or intrusion by itself does not automatically indicate hostile intent. A[n] intrusion into the communications network could be just an intelligence probe for future operations . . . . In the case of a CNA with only network effects, the consequences, although degrading a particular computer network, may not place [a military] force in imminent danger or be evidence of an impending attack. . . . This situation would be analogous to tolerating an aircraft tracking radar, but not a locked on fire control radar.[83]

Espionage—using spies to collect information about what another government is doing, or plans to do—is not a LOAC violation.[84] Covert actions against a state *in time of peace*, however, are generally considered violations,[85] as well as domestic law violations.[86] "[T]he

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[81] *Id.* at 11.
[82] Blank, *supra*, note 45, at 436.
[83] Vice Admiral James H. Doyle, Jr., U.S. Navy, *Computer Networks, Proportionality, and Military Operations*, *in* Schmitt & O'Donnell, *supra* note 62, at 147, 152, 153–54.
[84] Hague Convention IV Respecting the Laws and Customs of War on Land, art. 24, Oct. 18,1907, 36 Stat. 2277 [hereinafter Hague Convention IV]. No customary law or treaty forbids the practice, although the domestic laws of all nations criminalize espionage, e.g., in American law, 18 U.S.C. §§ 793, 794 (2014).
[85] UK MINISTRY OF DEFENSE, MANUAL OF THE LAW OF ARMED CONFLICT, ¶¶ 4.9.3 –.4, at 45–46 (Oxford Univ. Press 2004).
[86] *See, e.g.*, 50 U.S.C. § 413b(e) (2014). The Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5)(A) (1), is also on point. Neither law explicitly criminalizes covert acts, however.

utilization of cyber networks in carrying out collection activities likely entails a measure of conceptual overlap with covert action."[87] But, as the word "likely" suggests, when considering cyber operations, the status of covert acts remains unclear in LOAC and in international law.

X. Cyber Attacks on Civilian Critical National Infrastructure

Cyber attacks are not limited to military targets. The core principle of distinction prohibits attacks on civilians and civilian objects, which includes attacks on civilian computers. But would a cyber operation targeting the U.S. civilian aviation air control computer system, which the United States considers an element of its critical national infrastructure,[88] be a cyber attack raising the right to self-defense? Such an intrusion would likely result in the death of civilians in crashing aircraft, and the destruction of aviation-related objects, meeting the U.S. definition of a cyber attack justifying acts in armed self-defense, even though the target was a civilian computer system.

What if the intrusion was an Estonia-type series of intrusions that shut down America's banking system, closed Wall Street financial markets, silenced cell phone towers, and seriously disrupted interstate communications? Professor Schmitt is surely correct when he writes that it depends:

> Given the pervasive importance of cyber activities, an interpretation that limits the notion of attacks to acts generating physical effects cannot possibly survive . . . . Perhaps the likeliest prospect is eventual expansion of the notion of attack to include interference with essential civilian functions. The difficulty with such an approach is that the notion of attack does not currently contain a severity of consequences component other than the exclusion of *de minimus* damage or injury. Rather, it focuses on the nature of the harm—damage, destruction, injury, or death . . . . A more plausible prospect is that

[87] Williams, *supra* note 49, at 1166–67.

[88] Executive Order No. 13,010 (2006) (describing critical national infrastructure as including "telecommunications, electrical power systems, gas and oil storage and transportation, banking and finance, transportation, water supply systems, emergency services . . . and continuity of government").

> States will simply begin to treat operations against essential civilian services and data as attacks . . . creating the State practice upon which the evolution in meaning can be based . . . . Some activities, like banking and operation of critical civilian infrastructure, are self-evidently essential. Beyond that . . . only State practice will definitively pinpoint those civilian activities and data that qualify as essential.[89]

For now, if no one is killed or injured, if property is not physically destroyed or materially damaged, LOAC is uncertain on the subject and the question is left open, to be determined by state practice and *opinio juris*.

Nevertheless, the direction Schmitt suggests is already indicated in U.S. government documents relating to national cyber security.

> In 1998, the U.S. government officially made critical infrastructure protection a national goal and set out a strategy for cooperation between the government and the private sector to protect systems essential to the nation's security. Sadly, fifteen years later [in 2013], implementation of a plan to defend critical infrastructure is still pending."[90]

In the 2011 *Department of Defense Strategy for Operating in Cyberspac*e the United States warns, "The Department will . . . oppose those who would seek to disrupt networks and systems, dissuade and deter malicious actors, and reserves the right to defend these vital national assets as necessary and appropriate."[91] An Executive Order issued a month after the 9/11 attacks, also suggests counter-force, should the critical national infrastructure be attacked: "It is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential human and government services, and national

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[89] Schmitt, *supra* note 52, at 21.

[90] Brown, *supra* note 46, at 215 (citing Presidential Decision Directive/NSC 63, Critical Infrastructure Protection (May 22, 1998)).

[91] U.S. DEP'T OF DEFENSE STRATEGY FOR OPERATING IN CYBERSPACE (July 2011), *available at* http://www. slideshare.net/DepartmentofDefense/department-of-defense-strategy-for-operating-in-cyberspace.

security . . . ."[92] Presidential Policy Directive 20, of October 2012, states that "the United States Government shall retain DCEO [Defensive Cyber Effects Operations], including anticipatory action against imminent threats [to critical national infrastructure] . . . as an option to protect such infrastructure."[93] If one were to put key terms from those documents in a single sentence, it is U.S. "policy" to "oppose" through "Defensive Cyber . . . Operations" attacks on the critical national infrastructure. One may apparently surmise that a decision to defend the critical national infrastructure, as well as military objectives, has already been made by the United States.

XI. Cyber War Conflict Classification

Conflict classification, the first step in a LOAC analysis of any armed conflict, can be complex when a cyber attack is involved. Customary factors to determine conflict classification apply in cyber warfare: if two or more states oppose each other in an armed conflict, or non-state fighters are under the overall control of a state not directly involved in the conflict, it is an international armed conflict.[94] Similarly, if a state is engaged in armed conflict, not with another state, but with an armed opposition group, or groups, it may be a non-international armed conflict.[95]

An international armed conflict must by definition be "armed" and must be "international." The "armed" criterion has been discussed. In considering the "international" aspect of a common Article 2 conflict, if

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[92] Executive Order 13,231, *available at* www.dhs.gov/xlibrary/assets/executive-order-13231-dated-2001-10--16-initial.pdf.

[93] PRESIDENTIAL POLICY DIRECTIVE/PPD-20, U.S. CYBER OPERATIONS POLICY 8 (Oct. 2012) [hereinafter PPD-20]. At the date of this writing, PPD-20 ostensibly is a classified document. It is in the public domain, however, available at numerous Internet sites, including Wikipedia.

[94] Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 2 Aug. 12, 1949, 6. U.S.T. 3217, 75 U.N.T.S. 31 [hereafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, Aug. 12, 1949, 6. U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilians in Time of War, art. 2, Aug. 12, 1949, 6. U.S.T. 3516, 75 U.N.T.S. 286 [hereinafter GC IV].

[95] *Id.* GCs I, II, III, and IV, art. 3; UK MOD, MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 85, ¶¶ 3.5-3.10, at 31-33; SCHMITT, *supra* note 45, Rule 23, at 84.

a cyber attack were launched from Blueland against Redland by an individual, or a group of individuals acting on their own initiative, should a resulting conflict be viewed as "international"? Only if Blueland exercised overall control of the individual or group,[96] or otherwise endorsed or encouraged the attack. Otherwise, the attack would be the unlawful act of an individual subject to domestic law enforcement of the state from which the attack was launched. "States are required to take all necessary measures to ensure that their territories are not used by other States or non-State actors for purposes of armed activities, including planning, threatening, perpetrating or providing material support for armed attacks against other States and their interests."[97]

Might the same attack, launched by the same state-unaffiliated individuals be considered a non-international conflict? A cyber-initiated non-international conflict would require the participation of an organized armed group, or individuals, and protracted armed violence of a certain level of intensity.[98] Organization would require that the group act in a coordinated manner, with a headquarters, command structure, issuance of orders, including disciplinary orders, and an ability to enforce LOAC compliance.[99] An individual cyber attacker is unlikely to meet such criteria, nor can most groups, particularly those who "organize" on-line without a physical connection between members. These inabilities "would preclude virtually organized armed groups for the purpose of classifying a conflict as non-international."[100] Nor would cyber attacks initiated by an individual or group of individuals be likely to meet the non-international armed conflict criteria of intensity of violence, or its requisite protracted character.

In combination, these impediments raise a high bar that would hinder most cyber operations launched by individuals or groups from rising to

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[96] Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

[97] U.N. Secretary-General, *Developments in the Field of Information and Telecommunications in the Context of International Security*, U.N. Doc. A/66/152, at 19 (20 July 2010).

[98] Prosecutor v. Haradinaj, Case No. IT-04-84 T, Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008)

[99] Prosecutor v. Limaj, et al., Case No. IT-03-66-T, Judgment, ¶¶ 90, 94–129 (Int'l Crim. Trib. for the Former Yugslovia Nov. 30, 2005); Prosecutor v. Boškoski, Case No. IT-04-82-T, Judgment, ¶¶ 190, 196–97, 199–03 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008).

[100] Michael N. Schmitt, *Classification of Cyber Conflict*, 17 J. OF CONFLICT & SECURITY L. 245, 248 (2012).

non-international armed conflict status. Instead, their acts would likely be left to domestic law enforcement agencies, guided by human rights norms.

The resolution of conflict status classification issues, many of which are un-agreed upon in LOAC/IHL, will continue to evolve through state practice.

XII. Cyber Self-Defense

"Clearly, cyber will be an element of almost any crisis we're going to see in the future," according to the incoming commander of Cyber Command and the National Security Agency when he testified before the Senate Armed Services Committee in March 2014.[101] Largely unnoticed, cyber has become one more weapon to be employed as a matter of course in defense of the nation; our nation and the enemy's nation. "[W]hen exercised against a cyber armed attack, self-defense need not be circumscribed to 'cyber-on-cyber' warfare. Once a State is at war . . . it can use all the military assets available to it . . . whether they are kinetic or cyber."[102] "For targets of value," however, "cyber weapons are difficult to engineer, and delivery is difficult to orchestrate. These targets are often military or government systems that are highly secure . . . ."[103]

Presume that a state being cyber attacked knows it is being attacked—not always a safe presumption. "In fact, in most cases, the attack will already be over and the damage done by the time it is identified."[104] Once aware of an attack, however, a possible response is a counter-attack. Counter-strikes raise new and difficult LOAC issues, such as "the problems of identifying the perpetrators, determining their intent, affixing responsibility, and applying appropriate sanctions."[105]

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[101] David E. Sanger, *N.S.A. Nominee Promotes Cyberwar Units*, N.Y. TIMES, Mar. 12, 2014, at A18.
[102] Dinstein, *Concluding Remarks*, *supra* note 1, at 280.
[103] Evans & Lanchantin, *supra* note 51, at 689.
[104] Major Jeffrey K. Souder, *Information Operations in Homeland Computer-Network Defense*, J. OF ELECTRONIC DEF., Oct. 1, 2001.
[105] Jensen, *supra* note 59, at 213 (citations omitted).

Those calculations involve painstaking investigation, making an immediate counter-attack impractical, if not impossible.[106]

The principle of distinction remains applicable in cyber counter-attacks. "Not only are civilians and the civilian population protected from direct attack, but [measures] . . . must also be taken to reduce as much as possible the incidental effects on civilians and civilian property of attacks."[107] An immediate counter-attack against a presumed source, without significant prior trace-back efforts, or requests for investigative assistance from the state from where the attack originated, would very likely violate the principle of distinction.

To escape identification—attribution—and incidentally frustrate distinction, cyber attackers route their strikes through zombies, botnets, and networks, masked by multiple routers and hosts, making immediate identification of the state from which the attack was mounted, let alone attributing the attack to an individual or group, most difficult.

> Attribution is one of the most difficult issues in cyberattacks. Rarely is it possible . . . to determine who launched a given attack. The reasons for this are both legal and technical. Virtually every nation has statutes that forbid the unauthorized access into personal computers and internet service providers' servers, actions that would be necessary to trace-back (hack back) the attack to its origins. The process to seek judicial authorization is time consuming and burdensome; by the time it is granted the evidence is gone. And this presumes that this action is even possible.[108]

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[106] A group of individuals, angered by PayPal's decision to no longer process donations for WikiLeaks, orchestrated a series of denial-of-service attack on PayPal's computer system, for example. All involved were U.S.-based, used their own personal computers, and employed no "foreign" routers, networks or hosts to disguise their cyber tracks. Some did not bother to obscure their Internet Protocol addresses. Law enforcement officials took weeks to identify and apprehend those involved. Somini Sengupta, *For Suspected Hackers, a Sense of Social Protest*, N.Y. TIMES, July 26, 2011, at B-1. A foreign-based CNA would be a harder nut to crack.

[107] UK MOD, MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 85, para. 5.20.1, at 66.

[108] Richard Pregent, *Cyber Defense and Counterintelligence*, NATO LEGAL GAZETTE, no. 26, Sept. 19, 2011, at 13, 16. Mr. Pregent is NATO Headquarters' Legal Advisor for Allied Command Counterintelligence.

Often, with or without the cooperation of the state from which the attack originated, sophisticated computer-driven trace-back techniques can zero in on an attacker's computer.[109]

> [B]ut eventually you will probably get to a server that does not cooperate. You could, at that point, file a diplomatic note requesting that the law enforcement authorities in the country get a warrant, go around to the server, and pull its records as part of international cooperation in investigating a crime. That could take days, and the records might be destroyed by then. Or the country in question may not want to help you. When trace-back stops working, you do have the option of "hack back," breaking into the server and checking its records. Of course, that is illegal for U.S. citizens to do, unless they are U.S. intelligence officers.[110]

"[T]his appears to be potentially the most serious problem, i.e., aiming accurately at what the intended target is and, even if one manages to strike it with precision, not at the same time creating a host of unforeseen and unforeseeable effects."[111] If, one *can* aim accurately, however, a counter-attacker will have a target-rich environment because, "in cyber warfare . . . the physical infrastructure through which the cyber weapons (malicious codes) travel qualify as military objectives . . . . Disabling the major cables, nodes, routers, or satellites that these systems rely on will almost always be justifiable by the fact that these routes are used to transmit military information and therefore qualify as military objectives."[112] Indeed, at some point in cyber warfare, the principle of distinction could become almost meaningless in protecting civilian cyber infrastructure.

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[109] Adnan Aijaz, Syed Raza Mohsin & Mof Assir-ul-Haque, IP Trace Back Techniques to Ferret out Denial of Service Attack Sources, Sixth World Scientific & Engineering Academy & Society Int'l Conf. on Information Security and Privacy, Tenerife, Spain, 14–16 Dec. 2007 (2007). This brief paper by students of Pakistan's Military College of Signals, outlines the three most common trace back techniques (on file with author and available on Internet).

[110] CLARKE & KNAKE, *supra* note 13, at 214.

[111] Schmitt & Doswald-Beck, *Thoughts on Computer Network Attack*, *in* Schmitt & O'Donnell, *supra* note 62 at 169.

[112] Droege, *supra* note 6, at 564.

Military necessity justifies measures not forbidden by international law and that are indispensible for defeating the enemy. In observing military necessity, an attacked state must first make good-faith efforts to determine whether the state from which the attack was launched (presuming the state itself was not involved) will take action to identify and apprehend the attacker. Military "necessity addresses whether there are adequate non-forceful options to deter or defeat the attack, such as diplomatic avenues, defensive measures to halt any further attacks, or reparations for injuries caused."[113] Should those efforts fail, the need to assure the safety of the attacked armed forces and the critical national infrastructure from further attack is apparent. A counter-attack to, for example, disable an attacking computer network could be considered a military necessity—the defeat of the enemy by lawful means.[114]

A final pre-counter-attack hurdle is proportionality—whether the envisioned counterforce is proportionate to the attack suffered, and the need to repel or deter further attacks. Proportionality does not require a counter-strike to be equivalent in force or effect to that of the attack. In fact, the counter-strike may be significantly greater in force than that of the attack and still be proportional.

Once distinction, military necessity, and proportionality issues are sorted out, the specifics of a counter-attack may be considered. Satisfying these core requirements narrows a victim state's options. Can a counter-attack oriented on an attacker's reverse azimuth, routed through civilian computer networks, servers, and routers, ever avoid catastrophic damage to a civilian computer network, raising potential violations of distinction and proportionality despite efforts toward their satisfaction? Or, is the damage to the civilian network proportional and lawful collateral damage? If a counter-attack is not considered politically feasible and militarily possible, a means other than a cyber counter-attack may be required.

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[113] Blank, *supra* note 45, at 418.
[114] United States v. Wilhelm List, et al. ("The Hostage Case"), (1948), XI TWC 1253–54. *See also* Jensen, *supra* note 59, at 218.

XIII. A Possible Response to Cyber Attack in International Armed Conflicts

U.S. Standing Rules of Engagement allow a military response to a cyber attack based simply on the target of the attack.[115] Hostile intent may be inferred from the destruction of, or significant damage to, a computer system linked to critical national infrastructure, or to a secure military network. If the cyber attack killed, wounded, or destroyed military or civilian objects, it constitutes an armed attack and armed response may be lawful.

A responsive option to a confirmed unlawful cyber attack—one carried out as a surprise attack that opens hostilities, for example—is a belligerent reprisal. If the cyber attack was lawful, a reprisal would be an unlawful response. A reprisal is a specific violation of the law of armed conflict, undertaken in the course of an armed conflict, to encourage an enemy who has violated the law of armed conflict, to refrain from continuing their unlawful conduct.[116] Reprisals are limited to international armed conflicts.[117] "Reprisal amounts to an argument that crimes are justifiable as a proportionate response to criminal acts committed by the other party. In a sense, it is the most ancient means of enforcement of the law."[118] There are four requirements for a reprisal:

> 1. It must be a response to a prior violation of international law which is imputable to the state against which the reprisal is directed;
>
> 2. It must be reasonably proportionate;
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> 3. It must be undertaken for the purpose of putting an end to the enemy's unlawful conduct and preventing further illegalities and not for mere revenge; and

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[115] CHAIRMAN, JOINT CHIEFS OF STAFF, INSTR. 3121.01A, STANDING RULES OF ENGAGEMENT FOR U.S. FORCES paras. 5, 7 (15 Jan. 2000).
[116] JEAN PICTET, I COMMENTARY, GENEVA CONVENTION 1949, at 341–42 (1952).
[117] 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY HUMANITARIAN LAW, RULES Rule 148, at 526 (Cambridge Univ. Press, 2005).
[118] WILLIAM A. SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE 496 (Oxford Univ. Press 2010).

> 4. Since reprisals are a subsidiary means of redress, no other effective means of redress must be available.[119]
>
> Reprisals must be based on reasonable notice . . ., must be publicized (presumably to facilitate their deterrent effects), authorized only 'at the highest level of government (presumably to exclude emotive acts of personal revenge), and must be discontinued after the enemy eschews [its] egregious conduct . . . .[120]

Professor Dinstein writes, "On the whole, the most effective modality of self-defense against an armed attack in the shape of a CNA is recourse to defensive armed reprisals, to wit, forcible counter-measures undertaken at a different time and place."[121] Judge George Aldrich, Head of the U.S. delegation to the Geneva conferences that produced the 1977 Protocols, adds that "despite the 'limitations, risks, and unfairness of reprisals,' they may be the only remedial measure the victim State can take to coerce the enemy into respecting the law."[122]

A reprisal need not be immediate, giving a victim state time to positively identify the attacker and minimize issues of distinction, and it can be calibrated to meet proportionality requirements.[123] While the period between an attack and a reprisal may not be excessive, it may be sufficiently lengthy to seek the assistance of the state from which the attack originated. Although an unfriendly state is unlikely to meet its obligations to assist in identifying and apprehending cyber attackers

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[119] Christopher Greenwood, *The Twilight of Belligerent Reprisals*, 20 NETH. YEARBOOK OF INT'L L. 35 (1989).

[120] Michael A. Newton, *Reconsidering Reprisals*, 20 DUKE J. OF COMPARATIVE & INT'L L. 361, 375 (2010) (citing U.K. MOD, MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 85, § 16.17, at 419)).

[121] Dinstein, *Computer Network Attack*, *in* Schmitt & O'Donnell, *supra* note 62, at 107. A reprisal is not the same as self-defense. "The main difference between them is that in case of self-defense force is used to directly rebut an attack or counter some other form of prejudicial conduct, while reprisals are designed to force the adversary to change its conduct." SANDOZ, *supra* note 41, ¶ 3431, at 983.

[122] THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 12–13 (LEIDEN: MARTINUS NIJHOFF, 2006) (citing George Aldrich, *Compliance with International Humanitarian Law*, 282 INT'L REV. RED CROSS 301 (May–June 1991)).

[123] Philip Sutter, *The Continuing Role for Belligerent Reprisals*, 13-1 J. CONFLICT & SECURITY L. 93, 100–01 (Spring 2008). Sutter notes two theories of proportionality in reprisals. The predominant view is that reprisals must be proportionate to the initial violation. The second theory, that reprisals may be disproportionate in order to achieve the desired goal, the enforcement of LOAC, is generally rejected.

within its borders, perhaps because the state was itself involved, the attempt to gain cooperation must be made.[124]

Belligerent reprisals, that is, reprisals taken by belligerents in the course of an armed conflict, as opposed to peacetime reprisals,[125] have a long and disreputable history. Their widespread abuse in World War II, when they were permitted by the law of war, led to their prohibition in many circumstances. Today, reprisals against prisoners of war, civilians, civilian objects, cultural objects, medical and religious personnel, places of worship, works containing dangerous forces, and the natural environment, among other target categories, are prohibited in the 1949 Geneva Conventions.[126] (Notably, the United States does not consider Additional Protocol I's prohibition on reprisals against civilians to be customary law, viewing it as binding only on states ratifying that Protocol.) Reprisals are considered unlawful in peacetime.[127] Some view them as unlawful even in time of armed conflict. Although the line is often faint, "[a] reprisal is not revenge or retribution, but an act of compliance with the law of war. . . ."[128] An ICTY opinion authored by Presiding Judge Antonio Cassese suggests that reprisal may be a violation of customary law,[129] a view that does not reflect customary law.[130] The ICRC suggests that *ad hoc* tribunals are an adequate substitute for reprisals, rendering reprisals unlawful. A trial by tribunal, however, cannot be assured, and is a questionable deterrent to cyber violations.[131]

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[124] *See* Protocol I, *supra* note 77, art. 85.1, .2.

[125] A post-Additional Protocol I non-belligerent reprisal was, for example, European Community Regulation 1901/98 (7 Sept. 1998), prohibiting Yugoslavian airline flights between the Federal Republic of Yugoslavia and European Community nations. The financial reprisal was in response to continued Yugoslav *jus cogens* violations.

[126] *See* GC I, *supra* note 94, art. 46; GC II, *supra* note 94, art. 47; GC III, *supra* note 94, art. 13; GC II, art. 33; Protocol I, *supra* note 77, arts. 20, 51.6, 52.1, 53(c), 54.4, 55.2, and 56.4.

[127] *Legal Threat or Use of Nuclear Weapons*, *supra* note 2, ¶ 39.

[128] SCHABAS, *supra* note 118, at 95.

[129] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶¶ 527–36 (Int'l Crim. Trib. for the Former Yugoslovia Jan. 14, 2000).

[130] *See, e.g.*, Theodor Meron, *The Humanization of Humanitarian Law*, 94-2 AM. J. INT'L L. 239, 250 (Apr. 2000); Frits Kalshoven, *Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal*, *in* LAL C. VOHRAH ET AL., EDS., MAN'S INHUMANITY TO MAN: ESSAYS IN HONOUR OF ANTONIO CASSESE 481, 510 (The Hague, Kluwer Law Int'l 2003); UK MOD, MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 85, ¶ 16.19.2 n.62, at 421: "[T]he assertion that there is prohibition [against reprisals] in customary law flies in the face of most of the state practice that exists."

[131] Sutter, *supra* note 123, at 119.

The guiding Statutes of the ICTY, the International Criminal Tribunal for Rwanda, and the Rome Statute for the International Criminal Court, not only do not criminalize reprisal; they do not mention them at all. The ICRC's *Customary International Law Study* concludes that "it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals during the conduct of hostilities."[132] Interestingly, the ICRC *Study* also finds that there is "insufficient evidence that the very concept of lawful reprisal in *non*-international armed conflict has ever materialized in international law."[133]

The law of neutrality is not applicable in non-international armed conflicts. In international armed conflicts, however, neutrality would be a complex and delicate issue in conducting a belligerent reprisal, for it is universally accepted that "[n]eutral states must refrain from allowing their territory to be used by belligerent states for the purposes of military operations."[134] Military aircraft, for example, may not lawfully enter the airspace of another state without that state's permission.[135] A belligerent electronic reprisal routed through the cyberspace of another state on its way to its ultimate target in a third state would require the permission of the traversed state. A neutral state that knowingly permitted another state's reprisal access to its cyber network would be allowing a violation of its non-involvement in the conflict, potentially drawing the formerly neutral state into the armed conflict on the side of the reprising state.

Although not all commentators agree,[136] in international armed conflicts, reprisal appears to be a viable response to cyberattack. Frits Kalshoven, author of the leading text on reprisals, writes, "Belligerent reprisals, though by now [the year 2005] prohibited in important fields of the law of war, have not so far come under a total prohibition."[137] Lawful and unlawful belligerents on the battlefield, and command and control elements of a violating combatant force, remain lawful reprisal targets. It is fairly clear that, "in some circumstances a defense of

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[132] 1 HENCKAERTS & DOSWALD-BECK, *supra* note 117, at 523.
[133] *Id.* at 527 (emphasis added)
[134] UK MOD, MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 85, ¶ 1.43, at 20.
[135] U.S. DEPT. OF ARMY, FIELD MANUAL, FM 27-10, THE LAW OF LAND WARFARE 520 (July 1956) ("Should the neutral State . . . fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory.").
[136] Richard B. Lillich, *Forcible Self-Help Under International Law*, *in* JOHN NORTON MOORE & ROBERT F. TURNER, NATIONAL SECURITY LAW 113, 114 (2d ed. 2005).
[137] FRITS KALSHOVEN, BELLIGERENT REPRISALS 375 (republished ed. 2005) (Neither the cover nor the title page indicate it is a republication of the original 1971 edition.).

'reprisal' will be allowed if the violation [i.e., the reprisal] was a proportionate response to a violation committed by the opposing side."[138] And "exact equivalence between the target of the attack and the response has never been a requirement of belligerent reprisals."[139] As the 1977 Additional Protocol I *Commentary* notes, "Although such measures [reprisals] are in principle against the law, they are considered lawful by those who take them . . . i.e., in response to a breach committed by the adversary."[140] Their precise form, and how they might be delivered, will be dictated by the political and tactical situations at the time.

Belligerent reprisal is a possible response to an *unlawful* cyber attack in the course of an international armed conflict, not to every cyber attack. If a state Party were cyber attacked by an opposing state Party in an on-going international armed conflict, reprisal would not be a lawful option because the initial cyber attack would simply be another form of attack in the course of the armed conflict.

XIV. A Possible Response to Cyber Intrusions in International Armed Conflicts

If belligerent reprisal is a possible response to a cyber attack, how might a state lawfully respond to a cyber intrusion that does not rise to an attack? A category of responses offering lawful options is "countermeasures." In the early twentieth century, countermeasures were referred to as "peacetime reprisals." Essentially, they are reprisals without the use or threat of force. Possible countermeasures are varied, each tailored to the situation giving rise to their use.

The authoritative but non-binding Articles of State Responsibility describe countermeasures as "State actions, or omissions, directed at another State that would otherwise violate an obligation owed to that State and that are conducted by the former in order to compel or convince the latter to desist in its own internationally wrongful acts or omissions."[141] Like reprisals, countermeasures may be unlawful acts or

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[138] Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93-1 AM. J. INT'L L.57, 89 (Jan. 1999).
[139] JUDITH GARDAM, *NECESSITY*, PROPORTIONALITY AND THE USE OF FORCE BY STATES 79 (Cambridge Univ. Press, 2004).
[140] SANDOZ, *supra* note 41, ¶ 3426, at 982.
[141] Schmitt, *supra* note 68. Schmitt notes that the articles of *Responsibility of States for Internationally Wrongful Acts*, including Article 22, are not a treaty and therefore are

omissions undertaken by a victim state in response to an internationally wrongful act committed by or attributable to another state. They may be taken solely to induce, convince, or compel the other state to return a situation to lawfulness.

For instance, if wrongful Redland cyber operations are ongoing against Blueland's banking system, Blueland may respond with cyber countermeasures blocking Redland's access to its own state bank accounts, a limited pinpoint intrusion into the offending state's banking system that would not constitute a cyber attack. To block access to all Redland bank accounts, however, would affect non-state accounts and be a violation of distinction.

Countermeasures, like reprisals, must be preceded by a request that the responsible state remedy its wrongful act. Like reprisals, they may only be taken to induce compliance with international law after an earlier international wrong attributable to a state, they must be proportionate,[142] and they must be ended when the responsible state returns to compliance with its obligations. Also like reprisals, countermeasures to internationally wrongful cyber activity may be cyber or non-cyber in character, and they may not involve the threat or use of force.

Because countermeasures involve acts that are otherwise unlawful, they differ from acts in retorsion, which "refers to the taking of measures that are lawful, but 'unfriendly.' A State may, for example, block certain cyber transactions emanating from another State because the former enjoys sovereignty over cyber infrastructure on its territory."[143]

In September 1998, Electronic Disturbance Theater (EDT), a small group of individuals located in California, launched a pre-announced distributed-denial-of-service program against a Pentagon website. Notably, EDT referred to its cyber program as a virtual sit-in, and as

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non-binding. They nevertheless are authoritative, having been developed by the International Law Commission and commended to governments by the UN General Assembly in 2001. They are generally, although not universally, accepted as customary international law. Countermeasures are discussed in Part 3, Chapter II of the Draft Articles. *See generally* OMAR YOUSIF ELAGAB, THE LEGALITY ON NON-FORCIBLE COUNTER-MEASURES IN INTERNATIONAL LAW (Clarendon Press 1988).

[142] Countermeasures proportionality differs from the more familiar proportionality in LOAC/IHL. In gauging countermeasures proportionality the focus is on the injury suffered by the victim state, rather than limiting defensive measures to those required to defeat the armed attack of another state.

[143] Schmitt, *supra* note 68 (footnote omitted).

performance art. Their denial of service program, called "FloodNet," entered and searched the Pentagon website's search engine every nine seconds, effectively shutting it down. Having been forewarned, the Defense Information Systems Agency (DISA, now co-located and associated with CyberComm, at Fort Meade, Maryland) responded with a denial of service intrusion of its own and crashed the browsers being used by EDT.[144]

Was EDT's denial of service a cyber attack, a cyber intrusion, or an unlawful hack? There was no death, injury, destruction, or damage, nor was it trans-border; thus, it was not an attack. It was small-scale and targeted a specific computer system, the penetration of which was of some value, which describes a cyber intrusion. Taking place within the borders of the United States, it also was unlawful as a violation of the federal Computer Fraud and Abuse Act.[145] Was DISA's hack-back a countermeasure, or a retorsion? It was neither, because another state was not involved and there was no apparent violation by EDT of international law. What was DISA's countermeasure, then?

XV. Cyber Attacks and Intrusions in Non-International Armed Conflicts

Reprisals and countermeasures are limited to employment by states engaged in international armed conflicts. Cyber attacks and intrusions initiated by non-state actors and opposition groups not attributable to a state are criminal acts to be investigated, prosecuted, and punished by domestic authorities of the state from where the event emanated. Such cyber intrusions occur thousands of times every day. As Professor Schmitt notes, "in light of the imminent advent of 'cyber terrorism,' a State's obligation to control cyber activities taking place on its territory looms especially large."[146]

XVI. U.S. Cyber Practice

The United States was aware of cyberwarfare's threat well before the last century ended but took few defensive measures until well into the twenty-first century. In 2008, the President signed National Security

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[144] Winn Schwartau, *Cyber-Civil Disobedience*, NETWORK WORLD, Jan. 11, 1999.
[145] 18 U.S.C. § 1030 (a)(3) (2014).
[146] Schmitt, *supra* note 68.

Presidential Directive 54 (NSPD-54), *Comprehensive National Cybersecurity Initiative*[147] which was kept secret until 2010, discusses U.S. cybersecurity goals which, at the time, were rudimentary and predictable. NSPD-54's notable result, one that will have lasting effect, was construction of America's principal cyber data collection center at Bluffdale, Utah, near Salt Lake City.[148]

The 2011 *Department of Defense Strategy for Operating in Cyberspace* (*DoD Strategy*) notes in its Introduction that "[o]ur reliance on cyberspace stands in stark contrast to the inadequacy of our cybersecurity."[149] It goes on to explain that U.S. military cyber strategy centers on a five-point program that calls for the cooperation of the entire defense establishment, including civilian defense corporations, agencies, and individuals.

The *DoD Strategy* lays out each of the five "strategic initiatives." First, cyberspace is to be considered a distinct domain, allowing the "DoD to organize, train, and equip for cyberspace as we do in air, land, maritime, and space to support national security interests."[150] Future exercises and war games are directed to include cyber red (i.e., enemy) teams, as well as the development of a "National Cyber Range,"[151] apparently an electronic version of a live-fire rifle range. Second, the DoD will employ new defense operating concepts to protect networks and systems, including sensor, software, and intelligence defenses against insider threats, as well as outside intrusions into DoD networks and systems, including cloud computing. The *Strategy* next requires the DoD to act with other government departments and agencies, and the private (i.e., defense contractor) sector, to generate an overarching government-wide cybersecurity. Note that the *Strategy* is intended to protect DoD cyber operations and networks, not the United States as a whole, although through this third initiative, civilian organizations and

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[147] NATIONAL SECURITY PRESIDENTIAL DIRECTIVE 54 (8 Jan. 2008) ("The Comprehensive National Cybersecurity Initiative").

[148] Completed in late 2013, the $1.5-billion Community Comprehensive National Cybersecurity Initiative Data Center was the Pentagon's largest construction project in the United States to date. Operated by the NSA, the data collection center can intercept, capture, and store exabytes of a wide variety of electronic data, including foreign signals intelligence, U.S. domestic telephone, Internet, credit card usage data, and parking receipts. James Bamford, *The NSA Is Building the Country's Biggest Spy Center (Watch What You Say)*, WIRED MAG., Mar. 2012.

[149] DOD STRATEGY FOR CYBERSPACE, *supra* note 91.

[150] *Id.* at 5.

[151] *Id.* at 12.

corporations supplying defense technologies, weapons, and personnel are encompassed. The *Strategy* notes in a hopeful tone, "Public-private partnerships will necessarily require a balance between regulation and volunteerism . . . ."[152] Fourth, the DoD is directed to partner with allies and international partners to strengthen cybersecurity. "By sharing timely indicators about cyber events, threat signatures of malicious code, and information about emerging actors and threats, allies and international partners can increase collective cyber defense."[153] Finally, a high quality cyber workforce, capable of rapid technological advancement, is mandated. . . ."[154]

The American news media, anticipating release of the *DoD Strategy*, wrote that the Pentagon would consider cyber attacks to be "acts of war,"[155] The *Strategy* does not go that far, but it does announce that the "[DoD] will . . . oppose those who would seek to disrupt networks and systems, dissuade and deter malicious actors, and reserves the right to defend these vital national assets as necessary and appropriate."[156] Does "networks and systems" indicate that the DoD assumes responsibility for protecting civilian systems such as the critical national infrastructure? Former Secretary of Defense Robert Gates writes, "There was a deep division within the government—in both the executive branch and Congress—over who should be in charge of our domestic cyber defense: government or business, the Defense Department's National Security Agency, the Department of Homeland Security, or some other entity . . . . The result was paralysis."[157] Any paralysis in U.S. practice was soon cured, however.

Executive Order 13,231, *Critical Infrastructure Protection in the Information Age* (16 October 2001), issued a month after the 9-11 attacks, suggests unspecified retaliation, should the critical national infrastructure be attacked: "It is the policy of the United States to protect against disruption of the operation of information systems for critical infrastructure and thereby help to protect the people, economy, essential

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[152] *Id.* at 9.
[153] *Id.*
[154] *Id.* at 10.
[155] David E. Sanger & Elizabeth Bumiller, *Pentagon to Consider Cyberattacks Act of War*, WASH. POST, June 1, 2011, at A10. The article does not specify the document it refers to. It is possible there is a separate unannounced document denominating cyber attacks as acts of war.
[156] DOD STRATEGY FOR OPERATING IN CYBERSPACE, *supra* note 91, at 10.
[157] GATES, *supra* note 25, at 449.

human and government services, and national security. . .” Any covert cyber act initiated by the government, however, including DoD, and presumably the Central Intelligence Agency, requires a presidential finding, as well as notification of both the House and Senate intelligence committees.

In May 2011, two months before issuing the *DoD Strategy for Operating in Cyberspace*, the United States published its *International Strategy for Operating in Cyberspace*. The *International Strategy* is oriented less toward defense, instead promoting “an open, interoperable, secure, and reliable information and communications infrastructure that supports international trade and commerce. . . .”[158] Surprisingly, it is more direct than the *DoD Strategy* in asserting America’s response to cyber attack:

> When warranted, the United States will respond to hostile acts in cyberspace as we would to any other threat to our country. All states possess an inherent right to self-defense . . . . We reserve the right to use all necessary means—diplomatic, informational, military, and economic—as appropriate and consistent with applicable international law, in order to defend our Nation, our allies, our partners, and our interests.[159]

A report released by the Government Accounting Agency days after release of the 2011 *DoD Strategy* noted the lack of a joint doctrine for cyber operations: “[T]here is still a lack of clarity over whether the uniformed services should report to Cyber Command or the geographic combatant commands in cyber operations . . . .”[160] Military doctrine shaping operations on land, sea, air, and outer space have been in place for decades. Cyber warfare doctrine at the same level of detail and sophistication is evolving, but is not yet in place.[161]

U.S. Cyber Command (“CyberCom”) was established in May 2010. It is a subordinate unit of U.S. Strategic Command. Its creation should establish clearer command relationships and will shape military cyber

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[158] *International Strategy for Cyberspace*, *supra* note 3.
[159] *Id.* at 14.
[160] Ellen Nakashima, *GAO Faults Pentagon’s Cyber Efforts, Lack of Clarity*, WASH. POST, July 26, 2011, at A5.
[161] Thom Shanker, *U.S. Weighs Its Strategy on Warfare in Cyberspace*, N.Y. TIMES, Oct. 19, 2011, at A12.

doctrine. CyberCom is co-located with a major National Security Agency (NSA) facility, NSA's Threat Operations Center, at Fort Meade, Maryland. Significantly, CyberCom and NSA are commanded by the same four-star general, a circumstance objected to, reviewed, and confirmed by Congress in 2014. Co-locating Cyber Command and NSA allows both to leverage the expertise of the other, "obviating the need for reinventing many wheels."[162] CyberCom includes multi-service elements intermixed with civilian cyber experts. Its mission is to plan, coordinate, integrate, and conduct activities to direct the operations and defense of DoD information networks, to prepare and conduct military cyberspace operations, and to deny adversaries freedom of action in cyberspace.[163] This logically includes offensive, as well as defensive, cyber operations. Indeed, in 2010, the United States deployed an expeditionary cyber-support element to the Afghanistan combat zone.[164]

The 2008 *Comprehensive National Cybersecurity Initiative* and the 2011 *International Strategy for Operating in Cyberspace* are vague in regard to a U.S. response to cyber attacks.

> Neither defines a hostile act in cyberspace, nor is there language explicitly stating when, how, and to what extent the United States will respond to such acts . . . . The United States is better served in the long run by not establishing such thresholds. . . . If red lines are established, we will be compelled to respond to each threat that crosses the line, which is unrealistic . . . . [N]ot doing so allows government leaders the latitude to tailor response options. . . . [R]ed lines that automatically result in a response could escalate an already volatile situation.[165]

Since the establishment of CyberCom, however, the United States has been anything but vague in announcing its intended cyber practice. In 2013, CyberCom's commanding general revealed the establishment of

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[162] CLARKE & KNAKE, *supra* note 13, at 39.

[163] U.S. Cyber Command Fact Sheet, *available at* http://www.stratcom.mil/factsheets/cyber_command/.

[164] *U.S. Cyber-Command: Organizing for Cyberspace Operations, Before the House Armed Servs. Comm.* (statement of General Keith B. Alexander, Commanding General designate, U.S. Cyber Command, 111th Cong. (Sept. 2010).

[165] Lieutenant Commander John A. Mowchan, *Don't Draw the (Red) Line*, U.S. NAVAL INST. PROCEEDINGS, Oct. 13, 2013, at 10, 19–20.

forty cyber teams; thirteen of them programming teams to formulate and execute offensive cyber counterattacks in response to cyber attacks on the United States. "I would like to be clear that this team, this defend-the-nation team, is not a defensive team," the general testified at a House Armed Services Committee hearing. (The general apparently missed the irony of specifying that the "defend-the-nation team" is not defensive.) He continued, "This is an offensive team . . . to defend the nation if it were attacked in cyberspace. Thirteen of the teams that we're creating are for that mission alone."[166] The other twenty-seven teams, he said, focus on training and surveillance. Six months later, in September 2013, CyberCom activated a Cyber Mission Force, composed of National Mission Teams, Combat Mission Teams, and Cyber Protection Teams.[167] Although the teams' missions were unannounced, their titles suggest their direction.

In Tehran, in October 2013, Mojtaba Ahmadi, an Islamic Revolutionary Guards officer who commanded Iran's Cyber War Headquarters, was shot and killed by unknown assailants on his way to work.[168] Since 1977, five Iranian nuclear scientists have been murdered, as well. There is no accusation of U.S. involvement, but cyber warfare may have entered a dangerous stage extending the boundaries of LOAC/IHL.

> The Pentagon has developed a list of cyber-weapons and -tools, including viruses that can sabotage an adversary's critical networks . . . . [T]he military needs presidential authorization to penetrate a foreign computer network and leave a cyber-virus that can be activated later. The military does not need such approval, however, to penetrate foreign networks for a variety of other activities. These include studying the cyber-capabilities of adversaries or examining how power plants or other networks operate. Military cyber-warriors can also, without presidential authorization, leave beacons to mark spots for later targeting by viruses. . . . [T]he United States need not respond to a cyberattack in kind

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[166] Mark Mazzetti & David E. Sanger, *Security Chief Says Cyberattacks Will Meet With Retaliation*, N.Y. TIMES, Mar. 13, 2013, at A4.

[167] Admiral James Stavridis & David Weinstein, *Time for a U.S. Cyber Force*, U.S. NAVAL INST. PROCEEDINGS, Jan. 2014, at 40, 41.

[168] Caroline Byrne, *Ïranian Cyber Warfare Commander Shot Dean in Suspected Assassination*, THE LONDON TELEGRAPH (25 Nov. 2013).

> but may use traditional force instead as long as it is proportional . . . . [T]he use of any cyber-weapon outside an area of hostility or when the United States is not at war . . . requires presidential approval . . . .[169]

In November 2012, President Obama signed Presidential Policy Directive 20 (PPD-20), *U.S. Cyber Operations Policy*, revealing new U.S. cyber policies and initiatives; PPD-20 directs that the U.S. government shall conduct neither offensive or defensive cyber operations "that are intended or likely to produce cyber effects within the United States unless approved by the President."[170] A less sanguine section of PPD-20 directs that:

> The United States Government . . . shall make all reasonable efforts . . . to identify the adversary and the ownership and geographic location of the targets and related infrastructure where DCEO [defensive cyber effects operations] or OCEO [offensive cyber effects operations] will be conducted or cyber effects are expected to occur, and to identify the people and entities, including U.S. persons, that could be affected by proposed DCEO or OCEO.[171]

Another section discusses the critical national infrastructure, saying, "the United States Government shall retain DCEO, including anticipatory action taken against imminent threats . . . as an option to protect such infrastructure."[172] While specifying a protective interest in the critical infrastructure, the PPD does not announce how it will be defended before an attack, other than to say its protection shall be coordinated with the Department of Homeland Security.[173] Nevertheless, PPD-20 authorizes the Secretary of Defense to conduct "Emergency Cyber Actions necessary to mitigate an imminent threat or ongoing attack using DCEO if circumstances at the time do not permit obtaining prior Presidential approval . . . ."[174] The PPD suggests a strong U.S. offensive capability, along with an awareness of need for that capability's high-level control.

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[169] Ellen Nakashima, *Defense Dept. Develops List of Cyber-weapons*, WASH. POST, June 1, 2011, at A3.
[170] PPD-20, CYBER OPERATIONS POLICY, *supra* note 93, at 6.
[171] *Id.* at 7.
[172] *Id.* at 8.
[173] *Id.*
[174] *Id.* at 10.

It also illustrates that for cyber defense and responsive actions to be effective they must be predetermined and coordinated with Armed Service cyber security units, civilian law enforcement agencies, the Department of State, and international police agencies.

One might well ask whether, in U.S. practice, there is any *law* regarding cyber operations; any binding, codified regulation of cyber warfare activity. Although domestic laws and multistate treaties are sure to come, apparently there is none as of this writing. The publicly known guidance is a 2001 Executive Order protecting critical infrastructure, a 2008 Presidential Directive on national cybersecurity, a 2011 DoD strategy guidance, a similar executive-issued international strategy, and a 2012 PPD on cyber operations; an order, two directives, and two strategies. None have the force of law, but they authorize a broad range of U.S. cyber warfare practices.

XVII. Stuxnet[175]

Enriched uranium is critical to the manufacture of nuclear weapons. Uranium is enriched in high-speed centrifuges. Centrifuges depend on computerized operating directions and controls. Few companies have the technical ability to build such complex machines or their controlling electronic systems. Centrifuges, and millions of other mechanical devices that play vital roles in everyday life, are essentially controlled by small plastic boxes the size of a cigarette pack called programmable-logic controllers. "These controllers, or P.L.C.s, perform the critical scut work of modern life. They open and shut valves in water pipes, speed and slow the spinning of uranium centrifuges, mete out the dollop of cream in each Oreo cookie, and time the change of traffic lights from red to green."[176]

On June 17, 2010, a computer in Iran would not stop rebooting. Within a few days, a virus was found to be infecting the computer's Microsoft Windows operating system. The virus was a worm that replicated through infected e-mail, or when an infected flash drive was plugged into the computer. Leaving no sign of its presence, the virus

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[175] Except where indicated, this section is based on Michael Joseph Gross, *A Declaration of Cyber-War*, *Vanity Fair* (Apr. 2011) magazine, and the internet version of the same article, which differs slightly.
[176] *Id.* p. 1 of internet version.

uploaded two files: a "rootkit dropper," giving the worm administrator status in the computer's operating system, and a payload injector of encrypted malicious code. "The most unsettling thing about the virus was that its components hid themselves as soon as they got into the host."[177] Later, it was determined that the first Stuxnet infection occurred in June 2009.[178]

Within a few days, a German security analyst decrypted most of the infected payload and discovered that its target was P.L.C.s. Specifically, P.L.C.s in certain gas centrifuge models made by the German engineering conglomerate, Siemens.[179] On July 16, 2009, Microsoft issued the first of a series of patches, defenses against the virus, which had been found in only a few American and European sites. Thousands of infections were reported in India, Indonesia, and Iran. A Microsoft researcher named the virus "Stuxnet," for an anagram of letters from two sections of its code.

The digital code that allowed Stuxnet to pass from computer to computer was quickly revoked, but a new Stuxnet version, with a new digital pass code, immediately appeared and the worm continued to spread the virus. When it, too, was revoked, a third version appeared. When the third code was revoked no new digital pass code version arose, but the virus continued to spread from computers already infected.

It was apparent to researchers that a national government must have written the complex and lengthy (said to be a half-megabyte[180]) virus that exploited Windows' source code. Symantec became a major analyst of Stuxnet and "[a] Symantec strategist estimated that as many as 30 different people helped write it . . . [taking] at least six months."[181] Nor were the writers ordinary hackers.

When Stuxnet entered a host computer, it attempted to spread to all computers on that network, specifically searching for Siemens software. When found, the virus determined if the host computer was connected to

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[177] *Id.* at 2.
[178] John Markoff, *Malware Aimed at Iran Hit Five Sites, Report Says*, N.Y. TIMES, Feb. 13, 2011, at A12.
[179] Other sources cite another target: frequency converters, which apparently are P.L.C.-based power sources that control the speed of motors by changing the frequency converter's output frequency.
[180] Richard A. Falkenrath, *From Bullets to Megabytes*, N.Y. TIMES, Jan. 27, 2011, at A27.
[181] Gross, *supra* note 175, at 4.

a P.L.C. If so, the virus searched for a particular model of Siemens machine that the P.L.C. controlled, and inquired if the machine was operating under a specific range of conditions. If it was running within that range, Stuxnet injected the rogue code into the P.L.C. to vary the machine's operation. The variation radically varied the speed of the centrifuge's rotors, causing them to destroy themselves.[182] "In a spooky flourish . . . the worm ends the attack with a command to restore the current to the perfect operating frequency for the centrifuges . . . ."[183]

> [E]ven as it sabotages its target system, it fools the machine's digital safety system into reading as if everything were normal . . . . Stuxnet is like a self-directed stealth drone: the first known virus that, released into the wild, can seek out a specific target, sabotage it, and hide both its existence and its effects until after the damage is done.[184]

This is the course taken by Stuxnet in three waves of attacks on Iran's centrifuges at Natanz, the desert site of Iran's nuclear enrichment facility, where the Bushehr nuclear power plant is located.[185] The first attack was in late 2009, the other two in 2010.[186]

What damage did Stuxnet inflict on Iran's centrifuges, and its nuclear program? Reports vary, some reports being suspect. The *New York Times* wrote that Stuxnet involved Siemens' initial cooperation with the United States (almost surely incorrect), and that Stuxnet "appears to have wiped out roughly a fifth of Iran's nuclear centrifuges."[187] That would be as many as a thousand centrifuges. A *Times* security analyst source said, "The attackers took great care to make sure that only their designated targets were hit . . . It was a marksman's job."[188] Such care

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[182] William J. Broad & David E. Sanger, *Worm in Iran Was Perfect for Sabotaging Nuclear Centrifuges*, N.Y. TIMES, Nov. 19, 2010, at A1.
[183] *Id.*
[184] Gross, *supra* note 175, at 5.
[185] Markoff, *supra* note 178. Other sources assert there were two waves.
[186] Joby Warrick, *Iran Recovered Swiftly in Wake of Cyberattack*, WASH. POST, Feb. 16, 2011, at A1.
[187] William J. Broad, John Markoff & David E. Sanger, *Israel Tests Called Crucial In Iran Nuclear Setback*, N.Y. TIMES, Jan. 16, 2011, at A1.
[188] *Id.*

suggests someone concerned with distinction and proportionality.[189] "No independent hacker or criminal would bother with such niceties."[190]

> Stuxnet's code telegraphs the inherent caution of its makers in yet another way: it has a "fail-safe" feature to limit its propagation. The USB-spreading code, for instance, limits the number of devices that each infected device can itself infect. (The limit is three, enough to create a moderate chain reaction, but not so many that its effects would rage out of control.) Most dramatically, on June 24, 2012, the worm will self-destruct altogether; erase itself from every infected machine and simply disappear.[191]

In November 2010, Mahmoud Ahmadinejad, Iran's president, announced that a cyber attack had caused "minor problems with some of our centrifuges,"[192] and the UN's International Atomic Energy Agency reported that nearly 1,000 of Iran's Natanz centrifuges had been shut down for as long as a week. That is a period consistent with replacing all 4,800 centrifuges' operating software.[193] Despite the widespread damage, the Iranian enrichment process recovered in remarkably quick time, and "the net impact was relatively minor."[194]

To whom may the Stuxnet cyber attack be attributed? Most accounts credit it as a joint U.S.-Israeli project.[195] Although there is no proof of origin, media sources provide confirming details.[196] For example, details

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[189] One source, Markoff, *supra* note 178, notes that, based on a Symantec analysis, Stuxnet infected 12,000 computers. Unless those computers were part of a network associated with Siemens centrifuges, however, the impact of the infections likely were imperceptible. The 2010 repeated re-booting of the computer that brought Stuxnet to light apparently was a one-off.

[190] Brown, *supra* note 46, at 218.

[191] Gross, *supra* note 175, at 7.

[192] Broad, Markoff & Sanger, *supra* note 187.

[193] Glenn Kessler, *Centrifuges in Iran Were Shut Down, IAEA Report Says*, WASH. POST, Nov. 24, 2010. Other reports indicate 9,000 centrifuges (e.g.,Warrick, *supra* note 186).

[194] Kessler, *supra* note 193; Warrick, *supra* note 186. To the same effect, Gross, *supra* note 175, at 10.

[195] Kessler, *supra* note 193.

[196] David E. Sanger, *Obama Order Sped Up Wave of Cyberattacks Against Iran*, N.Y. TIMES, June 1, 2012, at A1. A few months later, Sanger expanded on his detailed information in, *Confront and Conceal*, iv–xiii; 188–209 (Crown Publishers 2012); Ellen Nakishima, *Flame Virus Has Infected Computers, Iran Says*, WASH. POST, May 30, 2012, at A3.

that Stuxnet was designed by a small programmer cell, the Office of Tailored Access Operations at the Fort Meade, Maryland, headquarters of the National Security Agency, with improvements and new versions from Israel's NSA equivalent, Unit 8200.[197] Further confirming the origin of Stuxnet, "[retired Air Force General] Michael D. Hayden, the former chief of the CIA, [said], . . . 'This is the first attack of a major nature in which a cyberattack was used to effect physical destruction . . . . [Y]ou can't help but describe it as an attack on critical infrastructure.'[198] American and Israeli authorities have denied neither their role, nor reports that Stuxnet was part of what is called "Operation Olympic." Another virus, Duqu, was an earlier reconnaissance tool for Stuxnet that copied blueprints of Iran's nuclear program.[199] A third Operation Olympic virus was Flame, a data-mining virus confirmed by Iran to have stolen information from its computers.[200]

"One big question is why its creators let the software spread widely, giving up so many of its secrets in the process."[201] The answer, according to one writer, is that Stuxnet was aimed only at Natanz's centrifuges but a careless Iranian scientist "plugged his laptop into the [centrifuge] computer controllers and the worm had hopped aboard. When he later connected the same laptop to the Internet, the worm broke free and began replicating itself, a step its designers never anticipated."[202] Although it should have been foreseen, it was not intended that Stuxnet should spread beyond the targeted machines.

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[197] *Id. See also* Sanger, *Confront and Conceal*, at 196. The Office of Tailored Access Operations (TAO) has additional units in San Antonio, Texas; Wahiawa, Hawaii; Fort Gordon, Georgia; Buckley Air Force Base, near Denver, Colorado; and a European liaison office in Darmstadt, Germany. The TAO's mission reportedly is "breaking into, manipulating and exploiting computer networks, making them hackers and civil servants in one." *Inside TAO: Documents Reveal Top NSA Hacking Unit*, 29 Dec. 2013, SPIEGEL ONLINE, *available at* http://www.sott.net/article/271802-Inside-TAO-Documents-reveal-top-NSA-hacking-unit.

[198] Sanger, *Confront and Conceal*, *supra* note 196, at 200.

[199] Nicole Perlroth, *Researchers Find Clues In Malware*, N.Y. TIMES, May 31, 2012, at B1.

[200] *Id.*; Thomas Erdbrink, *Iran Confirms Attack by Virus That Collects Information*, N.Y. TIMES, May 30, 2012, at A4; Hayley Tsukayama, *Malware is linked to Stuxnet, Flame*, WASH. POST, Aug. 10, 2012, at A3. Flame, first encountered in December 2007, first reported on in May 2012, reportedly can steal computer screen images, record e-mail and chats, monitor keystrokes, remotely turn on microphones, and take screen shots.

[201] John Markoff, *A Silent Attack, But Not A Subtle One*, N.Y. TIMES, Sept. 27, 2010, at A6.

[202] Sanger, *Confront and Conceal*, *supra* note 196, at xii.

Was Stuxnet a cyber attack? Is attribution satisfied? General Michael Hayden, former head of the National Security Agency (NSA), and before that the Central Intelligence Agency (CIA), says it was an attack on Iran by America. It resulted in the destruction of military or civilian objects. If similar results resulted from a kinetic strike, would it be an attack? Would self-defense have been justified under IHL? "Stuxnet was the first time a cyber activity could indisputably be labeled a cyber attack . . ."[203] The United States will find it difficult to complain, should another state mounts a similar attack against similar American targets.

"One big question is why its creators let the software spread widely, giving up so many of its secrets in the process."[204] The question is significant because "Stuxnet is now a model code for all to copy and modify to attack other industrial facilities."[205]

"In the end, the most important thing now publically known about Stuxnet is that Stuxnet is now publicly known."[206]

XVIII. Summary

If there is a circumstance in armed conflict that was unforeseen (and unforeseeable) by the 1949 Geneva Conventions, it is cyber warfare. Still, cyber warfare can be dealt with using traditional law of war tools, even though today's *jus ad bellum* cyber war questions can instantly ripen into *jus in bello* issues. Cyber attacks are not *per se* LOAC/IHL violations. They are simply another strategy or tactic of warfare, like armed drones and artillery barrages. When considering their effect or use, in many respects they may be thought of as if they were kinetic weapons.

How does one distinguish a hacker's cyber intrusion from an enemy state's cyber attack? The United States employs a results test. If the intrusion results in death or wounding, or the destruction or significant

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[203] Brown, *supra* note 46, at 218.
[204] Markoff, *supra* note 201.
[205] Warrick, *supra* note 186. In late 2011 a "new program [to steal digital information] was written by programmers who must have had access to Stuxnet's source code, the original programming instructions." John Markoff, *New Worm by Creators of Stuxnet is Suspected*, N.Y. TIMES, Oct. 19, 2011, at B6.
[206] Gross, *supra* note 175, at 11.

damage of military or civilian objects, including data, an attack may be presumed, just as if the event involved kinetic weapons. Death, wounding, or destruction may be neither presumed nor potential; they must be actual. Similarly, at least in U.S. policy, an attack apparently may be presumed if a CNA targets any part of the critical national infrastructure, or a civilian computer network closely associated with the military, such as that of a major defense contractor's classified network—as long as death, wounding, or physical destruction follow. Although there is no international agreement to the U.S. position, such consequences, the United States considers, may be deemed an attack with armed force, giving rise to self-defense under UN Charter Article 51. Whether a CNA or a bombing attack, an attacker's choice of arms is immaterial.

Non-state armed opposition groups, such as al Qaeda and its off-shoots, are not known to have engaged in cyber attacks, yet. If past is prelude, a cyber attack will more likely be initiated by another state, or an individual or group whose actions will be attributable to a state; an international armed conflict in which the 1949 Geneva Conventions, in their entirety, and Additional Protocol I, will apply, along with customary international law. Should a non-state armed opposition group without state sponsorship mount an attack the circumstances would be examined to determine if it was an effort to initiate of an armed conflict, or "merely" a criminal act. In either case, the attack should be a matter for domestic law enforcement authorities. A cyber attack by non-state actors, difficult as that might be to carry out, would open the door to a common Article 3 conflict, with possible Additional Protocol II, and customary law, application, in addition to common Article 3 itself.

Responding to a confirmed cyber attack raises difficult issues. Immediate counter-attacks will likely consist of pre-programed automated cyber operations. "Such 'hack-backs' simply target the computers from which the intrusion originates."[207] But, to whom, or to what entity, should the attack be attributed? How can the requirement for distinction be satisfied by a counter-attacker at each stop on the attacker's electronic back-trail? How may a counter-strike be made proportional? In an international armed conflict a possible answer is belligerent reprisal. Because a reprisal need not be immediate, there can be a reasonable period of time to calibrate a response and assure the identity and lawfulness of the target. Reprisals are not problem-free, nor

[207] Droege, *supra* note 6, at 574.

are they universally agreed upon as a tactic. They are, however, a possible means of responding to a cyber attack that can avoid the most obvious pitfalls associated with an immediate response, electronic or kinetic.

Meanwhile, all states continue to strengthen their cyber defenses. For the United States, that includes presidential findings and policy directives, some no doubt secret, a *Defense Strategy* document, and CyberComm. China and Russia are most frequently portrayed as the dark knights of cyber warfare but the United States more than holds its own in regard to offensive cyber stratagems.

Are U.S. defensive capabilities equally well advanced? Numerous attacks against U.S. networks involve computer hardware compromised at point of manufacture.

> Software is most of the problem. We have to find a way to write software which has many fewer errors and which is more secure . . . . Hackers get in where they don't belong, most often because they have obtained 'root' or administrator status, through a glitch they have discovered in the software.[208]

Threats from within, personnel with legitimate access to secrets, government workers like Edward Snowden, willing to provide information to a nation's enemies, will always be a threat to cyber secrets.

Still, so far, no one is known to have died from a cyber attack anywhere in the world. A long-time cyber expert in the military and civilian communities writes:

> The most meaningful cyber conflicts rarely occur at the "speed of light" or "network speed. . . . ." [Cyber] conflicts are typically campaigns that encompass weeks, months, or years of hostile contact between adversaries, just as in traditional warfare . . . . While some attacks are technically difficult to attribute, it is usually a straightforward matter to determine the nation responsible, since the conflict takes place during an on-

[208] CLARKE & KNAKE, *supra* note 13, at 173.

> going geo-political crisis . . . . Despite early fears that nations would strike at each other using surprise . . . there is no evidence that such conflicts have occurred. Nations seem to be willing to launch significant cyber assaults during larger crises, but not out of the blue . . . .[209]

Reassuring words. There need be but one cyber Pearl Harbor to prove them wrong, however. In any event, much will have occurred between the writing of these words and their reading to materially change the terrain of cyber warfare.

[209] Healey, *supra* note 15, at 21–23.

PASS THE SIGAR: CUTTING THROUGH THE SMOKE OF LESSONS LEARNED IN SIMPLIFIED CONTINGENCY CONTRACTING OPERATIONS

MAJOR JUSTIN M. MARCHESI*

Applying a force's full combat power requires unity of command. Unity of command means that a single commander directs and coordinates the actions of all forces toward a common objective. Cooperation may produce coordination, but giving a single commander the required authority is the most effective way to achieve unity of effort.[1]

I. Introduction

For over ten years, the Armed Forces of the United States have been decisively engaged in combat contingency operations across the globe.[2] While the bulk of these operations have focused on Iraq and Afghanistan, the scope of this world-wide mission is without precedent. Never before, in the history of the U.S. military, have so few uniformed Servicemembers been tasked to successfully topple two regimes, stabilize an unprecedented amount of territory, and reconstruct a vast network of infrastructure that had either never existed or had been ravaged by years of neglect, conflict, and economic sanctions.[3] In fact,

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[1] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, at A3 (27 Feb. 2008) (describing the Unity of Command principle of war and operations).

[2] *See* Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498; Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

[3] *See* COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFG., TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISKS 17 (2011) [hereinafter CWC FINAL REPORT] (citing CONG. RESEARCH SVC., REPORT NO. R41677, INSTANCES OF USE OF

the size of the force performing these missions, and its supporting uniformed logistical force structure, is dramatically smaller than that of *any* modern wartime force of the United States.[4]

The stage was set for this situation when active duty forces were reduced by thirty-one percent following the end of the Cold War and the successful liberation of Kuwait in the Persian Gulf War.[5] This spurred a reevaluation of core military competency priorities where a focus on the maintenance of offensive combat capabilities was of paramount concern. This preservation of combat power, however, came at the expense of a litany of organic sustainment capabilities necessary for the extended combat, stability, and support operations the U.S. military has encountered since 9/11.[6]

As a result, the herculean missions of the past decade relied heavily upon privately contracted security, logistics, and construction services.[7]

UNITED STATES ARMED FORCES ABROAD, 1798–2010 (2011)), *available at* http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf.

[4] *See* Lance M. Bacon, *Cutting Half an Army: End Strength in the Cross Hairs*, ARMY TIMES, Mar. 11, 2013, at 20 (noting the Army's end strength in the following years: 1945 (8,266,373); 1955 (1,109,296); 1970 (1,322,548); 1990 (732,403); and 2012 (551,000)).

[5] ANTHONY H. CORDESMAN, CTR. FOR STRATEGIC AND INT'L STUD., TRENDS IN US MILITARY FORCES AND DEFENSE SPENDING 11 (1999) (noting that the active duty U.S. military manpower levels of all services combined dropped from approximately 2 million in 1991 to approximately 1.39 million in 1999).

[6] *See* U.S. DEP'T OF DEF. INSPECTOR GENERAL, REPORT NO. 2012-134, CONTINGENCY CONTRACTING: A FRAMEWORK FOR REFORM 2012 UPDATE 1 (2012) [hereinafter DOD IG 2012 UPDATE] ("These contractors perform vital tasks in support of U.S. defense and development objectives, including logistics support, equipment maintenance, fuel delivery, base operations support, and security."), *available at* http://www.dodig.mil/audit/reports/fy12/dodig-2012-134.pdf; CWC FINAL REPORT, *supra* note 3, at 28 ("There are several reasons agencies rely on contractors for contingency-support services: . . . military services' having concentrated limited resources on combat functions, which led to a degradation of organic capability.").

[7] *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-212, WARFIGHTER SUPPORT: DOD NEEDS ADDITIONAL STEPS TO FULLY INTEGRATE OPERATIONAL CONTRACT SUPPORT INTO CONTINGENCY PLANNING 6 (2013) [hereinafter GAO WARFIGHTER SUPPORT REPORT 2013] ("The U.S. military routinely uses contracted support in contingency operations. Military forces will often be significantly augmented with contracted support because of the continual introduction of high-technology equipment, coupled with force structure and manning limitations, and the high pace of operations."); CWC FINAL REPORT, *supra* note 3, at 28 (noting that contracts are used extensively because of: (1) statutory limits on the end strength of military and civilian personnel; (2) a concentration on combat functions that has degraded organizational logistical capabilities; (3) long recruitment and training lead times; (4) voluntary nature of deployments for civilian employees; and (5) a presumption of cost effectiveness for contracts).

The contingency contracting mission was left to an established peacetime acquisition structure ill-prepared for the onslaught of fast-paced contract planning, formation, and administration duties necessary in a contingency environment.[8] According to the Commission on Wartime Contracting, *at least* thirty-one billion dollars have been consumed by fraud, waste, and abuse by contractors, commands, and contracting personnel involved in operations in Iraq and Afghanistan.[9]

The hard-won lessons learned from these contingency contracting experiences over the past decade cannot, in good conscience, go to waste as they have in the past.[10] The requirement for contractor service support in future contingency operations will only increase and the operational Army must embrace this fact.[11] While the creation of the new Expeditionary Contracting Command was a productive first step toward

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[8] *See* CWC FINAL REPORT, *supra* note 3, at 27 ("While Defense has a dedicated acquisition workforce and a mature process for acquiring and managing commodities and major weapons systems, there has been no comparable government-wide focus on the acquisition of contingency-support services.").

[9] *Id.* at 1 ("At least $31 billion, and possibly as much as $60 billion, has been lost to contract waste and fraud in America's contingency operations in Iraq and Afghanistan."). This conservative number does not include the massive potential waste due to the completion of unsustainable projects. *Id.* at 70; *see, e.g.*, SPECIAL INSPECTOR GEN. FOR AFG. RECONSTRUCTION, AUDIT NO. 10-6, CONTRACT DELAYS LED TO COST OVERRUNS FOR THE KABUL POWER PLANT AND SUSTAINABILITY REMAINS A KEY CHALLENGE (2010) (detailing the construction of the $300 million Tarakil Power Plant in Kabul that the government of Afghanistan cannot afford to independently operate); SPECIAL INSPECTOR GENERAL FOR IRAQI RECONSTRUCTION, REPORT NO. PA-08-138, KAHN BANI SA'AD CORRECTIONAL FACILITY (2008) ("[T]he [Ministry of Justice] had no plans to 'complete, occupy, or provide security for this facility."); *see also infra* notes 61–62 and accompanying text.

[10] COMM'N ON ARMY ACQUISITION AND PROGRAM MGMT. IN EXPEDITIONARY OPERATIONS, URGENT REFORM REQUIRED: ARMY EXPEDITIONARY CONTRACTING 16 (2007) [hereinafter GANSLER COMM'N REPORT] ("[T]he expeditionary experiences in Haiti, Bosnia, and Kosovo had not been leveraged into building an operational or institutional capability to support the next military operation."), *available at* http://www.acq.osd.mil/dpap/contingency/reports/docs/gansler_commission_report_final_report_20071031.pdf.

[11] CWC FINAL REPORT, *supra* note 3, at 32–33 ("The ongoing debate about the federal budget and the deficit is likely to translate into reductions in the size of the military and federal-civilian workforce, but not a corresponding reduction in national-security missions. This 'do the same with less' outcome—or an even riskier 'do more with less' outcome—may drive an even heavier over-reliance on contractors than has been seen in the past decade."); GANSLER COMM'N REPORT, *supra* note 10, at 7 ("[T]he Army needs to recognize that, in order to operate in a streamlined, agile, expeditionary environment, it must, by necessity, rely on contractors to provide combat service support."); *see* GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 6.

providing resources dedicated to tackling the most complex and expensive contingency contracts,[12] it remains an incomplete solution for the vast majority of small-scale contracts. Over eighty-six percent of the contingency contracts issued in Iraq and Afghanistan were below the simplified acquisition threshold (SAT) and accounted for only thirty percent of the funds spent.[13] This dramatic contrast in the high volume of contracting actions and the low overall value of each contract coupled with the competing priorities of higher value, more complex contracts exacerbates many of the long-standing problems associated with both large- and small-scale contingency contracting.[14]

Rather, as this article argues, the Army should continue its transformation into a modular brigade combat team (BCT)-centric force that is structured to provide BCT commanders with the organic capabilities necessary to independently accomplish assigned missions in austere environments. By adopting contingency contracting below the SAT level as a core Logistics branch function and integrating a contingency contracting function into the logistics staff structure at the brigade level, BCT commanders will be better resourced to fulfill the independent mission capability of their modular brigades.[15]

In support of this proposal, Part II of this article explores the rise of the modern Expeditionary Contracting Command. Part III examines the continuing lessons learned from operations in Iraq and Afghanistan.

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[12] GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 17 n.28.

[13] GANSLER COMM'N REPORT, *supra* note 10, at 28. For a discussion of the SAT, see *infra* Part III.A.

[14] *See infra* Part II and Appendix C (surveying the negative findings of Special Inspector General for Iraq Reconstruction (SIGIR) and Special Inspector General for Afghanistan Reconstruction (SIGAR) contracting audits and inspections from 2004–2012); *see also* GANSLER COMM'N REPORT, *supra* note 10, at 9 ("Perhaps most notable was a question that the Commission repeatedly asked the experts, 'Who in the Army is responsible for the situation we are in today?' In reply, the Commission repeatedly heard that there are no General Officers responsible for Army contracting—responsibility was diffused among many organizations, both within CONUS and in the field.").

[15] This proposal is roughly analogous to the Personnel Services Delivery Redesign that transferred the functions of the Personnel Services Battalion to Brigade S-1 sections throughout the Army in an effort to decentralize mission essential service support functions. ADJUTANT GEN. CORPS, U.S. DEP'T OF ARMY, HR SUPPORT TO THE MODULAR ARMY: PERSONNEL SERVICES DELIVERY REDESIGN (2006). "The result [was] improved HR support to the warfighter that is more effective, more efficient, and more responsive." Lieutenant Colonel Christopher B. Nichols, *Personnel Services Delivery Redesign*, ARMY LOGISTICIAN, July–Aug. 2009, at 1, *available at* http://www.almc.army.mil/alog/issues/JulAug09/pdf/alog_julaug09.pdf.

Lastly, Part IV then describes how and why a decentralized, commander-centric methodology is the most effective strategy for implementing these continuing lessons learned at the small-scale, simplified acquisition level, ensuring that contingency contracting serves as a force multiplier in future operations.

II. The Gansler Commission and the Rise of Expeditionary Contracting Command

A. The Commission

On September 6, 2007, after almost six years of continuous combat operations and extensive contingency contracting use, Secretary of the Army Pete Geren appointed the Honorable Jacques Gansler to chair the Commission on Army Acquisition and Program Management in Expeditionary Operations.[16] Under its charter, the Gansler Commission was asked to "review the Army's policies, procedures, and operations in [contingency contracting] . . . ."[17] The Commission made over two dozen findings and recommendations detailing the systemic failures of the Army acquisition system in the ongoing world-wide contingency operations.[18]

The crux of the challenge facing the Army's contingency contracting capability in 2007 was that "[t]he overall acquisition workforce (especially the military) [was] weapons-system focused."[19] This reflected the institutional Army's failure to adapt to the contemporary expeditionary environment.[20] For instance, at the time, uniformed Soldiers comprised only three percent of the Army acquisition workforce and the Army's Acquisition Corps lacked general officer billets.[21]

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[16] GANSLER COMM'N REPORT, *supra* note 10, at 20, app. B, at 79. Among Dr. Jacques S. Gansler's litany of qualifications, he was a Member of the National Academy of Engineering and a Fellow of the National Academy of Public Administration in addition to previously serving as the Under Secretary of Defense for Production and Logistics, the Under Secretary of Defense for Acquisition, Technology and Logistics, the Deputy Assistant Secretary of Defense for Material Acquisition, and the Assistant Director of Defense Research and Engineering for Electronics. *Id.* app. A, at 75.

[17] *Id.* app. B, at 79.

[18] *Id.* app. C, at 90.

[19] *Id.* at 26 (referring to large U.S.-based acquisitions, as opposed to small-scale contingency support contracts procured in the theater of operations).

[20] *Id.* at 20.

[21] *Id.* at 32. Comparatively, the U.S. Air Force acquisition workforce was comprised of

Not surprisingly, "Army culture [was] focused on warfighting and thus neither recognize[d] the critical and complex nature of contracting nor reward[ed] people in the contracting community."[22] A perfect example of this cultural defect was the number of open contract fraud investigations at the time: Army contracting personnel were found to be the target of fraud investigations far more than any other service despite representing a distinct minority of contracting personnel in theater.[23] Beyond the prevalence of suspected willful misconduct, the cultural disconnect was also found to be the root cause of routinely inadequate pre-award contract planning and numerous post-award contract management and oversight failures that led to billions in losses to the U.S. taxpayer.[24]

B. Modern Contingency Contracting Force Structure

On January 30, 2008, shortly after the publication of the Gansler Commission Report, the Secretary of the Army ordered the establishment of Army Contracting Command as a major subordinate command of Army Materiel Command.[25] In an effort to correct the institutional deficiencies identified by the Commission, Army Contracting Command was established as a two-star level command and organized into two subordinate one-star elements.[26] Mission and Installation Contracting Command was tasked with providing "contracting support for the war fighter across Army commands, installations and activities located throughout the continental United States, Alaska and Puerto Rico."[27]

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at least thirty percent uniformed military members with two permanent general officer positions and a third temporary joint General Officer billet. *Id.*

[22] *Id.* at 29.

[23] *Id.* at 22 (noting that, in Southwest Asia at the time the report was published, the Air Force had 70% of the personnel with only one open fraud case while the Army had 28% of the personnel with seventy-seven open fraud cases).

[24] *Id.* at 21–22, 25–26, 27–28, 39–43 (detailing the difficulties encountered as a result of incomplete or unreasonable operational planning, incremental funding, inadequate contractor monitoring, and poor records keeping); *see infra* Appendix C (surveying the negative findings of SIGIR and SIGAR audits and inspections).

[25] Headquarters, U.S. Dep't of Army, Gen. Order No. 2009-20 para. 1 (8 July 2009) [hereinafter Gen. Order No. 2009-20]. *But see* History of the U.S. Army Contracting Command, ARMY CONTRACTING COMMAND, http://www.acc.army.mil/command-and-staff/staff/historian/ (last visited Mar. 15, 2013) (noting, perhaps erroneously, that the Army Contracting Command was established on 1 October 2008).

[26] *Army Contracting Command Fact Sheet*, ARMY CONTRACTING COMMAND, http://www.acc.army.mil/files/ACC.pdf (last visited Mar. 15, 2013).

[27] *Mission and Installation Contracting Command Fact Sheet*, ARMY CONTRACTING

The fundamental concerns of the Commission, however, were to be addressed by the other new element, Expeditionary Contracting Command (ECC).

Established on October 1, 2008, ECC assumed responsibility for contracting support to commanders stationed outside the continental United States.[28] As such, the Commanding General of ECC was appointed as a Head of Contracting Activity.[29] In theory, the ECC commander would become the officer ultimately accountable for contingency contracting operations.[30] To this end, ECC was organized into subordinate contracting support brigades.[31] Each contracting support brigade was regionally aligned with the Army component commands associated with each geographic unified combatant command.[32] These contracting support brigades were to serve as the largest deployable contracting element and as the Principal Assistants Responsible for Contracting, focusing primarily on planning and management.[33]

COMMAND, http://www.acc.army.mil/files/MICC.pdf (last visited Mar. 15, 2013).

[28] Gen. Order No. 2009-20, *supra* note 25, para. 3a.

[29] U.S. DEP'T OF ARMY, FIELD MANUAL 4-92, CONTRACTING SUPPORT BRIGADE para. 1-4 (12 Feb. 2010) [hereinafter FM 4-92] ("[Head of Contracting Activity] is the official who has overall responsibility for managing the contracting activity."); *see also* FAR 2.101 (2013) (defining "head of contract activity"); *id.* 1.601 (describing how contract authority and responsibility flows from the agency head to the designated heads of contracting activities to the contracting officers).

[30] FM 4-92, *supra* note 29, para. 1-4. *But see infra* Part I.C.

[31] Command Organization, EXPEDITIONARY CONTRACTING COMMAND, http://www.acc.army.mil/ecc/command-and-staff/ (last visited Mar. 15, 2013). The existing contracting support brigades that reported directly to Army Materiel Command prior to the activation of Army Contracting Command were reassigned to ECC when it was established. Gen. Order 2009-20, *supra* note 25, para. 3a; *see also* FM 4-92, *supra* note 29, para. 1-1 ("Headquarters Department of the Army (HQDA) directed modular force actions led to the consolidation of all theater support contracting capabilities into US Army Materiel Command (USAMC) Table of Organization and Equipment (TOE) units assigned to the new U.S. Army Contracting Command (USACC) and its subordinate Expeditionary Contracting Command (ECC). . . . Additionally, corps, divisions and brigade combat teams (BCTs) no longer have contingency contracting officers (CCOs) assigned to their support command TOEs. In the modular force, these tactical-level theater support contracting staff members have been transformed into separate contingency contraction battalions (CCBNs), senior contingency contracting teams (SCCTs) and contingency contracting teams (CCTs).").

[32] FM 4-92, *supra* note 29, fig.1-1, at 1-2.

[33] *Id.* para. 1-1.

Each contracting support brigade was organized into contingency contracting Battalions, which were aligned with (but not assigned to) Army corps headquarters,[34] and senior contingency contracting teams, which were aligned with (but not assigned to) numbered division headquarters.[35] The contingency contracting battalions, like their superior contracting support brigades, were tasked primarily with planning and management duties "vice actually writing and executing contracts."[36] Rather, "the Army's primary deployable theater support contracting maneuver unit and building block" was the Contingency Contracting Team that "normally deploy[s] and serve[s] under the command of a [Contingency Contracting Battalion] . . . ."[37] The intent was to provide contracting assets to field commanders that were "available as units (vice individuals), organized and deployed in accordance with [mission, enemy, terrain, troops, time, civilian] and other factors . . . ."[38]

These assets remain under the direct command and control of ECC through each contracting support brigade. Contingency contracting battalions, senior contingency contracting teams, and contingency contracting teams are only to be aligned with and available to support the contracting requirements identified, planned, and prepared by field commands during contingency operations.[39] For any purchase that exceeds the micro-purchase threshold,[40] the requiring activity is presently required to follow a lengthy process to obtain the needed supplies or services.

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[34] *Id.* para. 1-15.
[35] *Id.* para. 1-17.
[36] *Id.* para. 1-16.
[37] *Id.* para. 1-18. "Like [Senior Contingency Contracting Teams], [Contingency Contracting Teams] are small TOE teams consisting of five [Contingency Contracting Officers], but led by a Major ([O]4) ." *Id.*
[38] *Id.* para. 1-23.
[39] *See id.* para. 2-18. Interestingly, current regulations and doctrine do not mandate, or even address, the participation of Contract Support Brigade elements in the field training exercises, mission rehearsal exercises, or command post exercises of operational warfighting units. *See* U.S. DEP'T OF ARMY, REG. 715-19, OPERATIONAL CONTRACT SUPPORT PLANNING AND MANAGEMENT (20 June 2011) [hereinafter AR 715-19]; FM 4-92, *supra* note 29. For a brief discussion of how contingency contract training integration might positively impact Army culture and operational readiness, see *infra* Part III.D.
[40] The micro-purchase threshold, in a contingency environment, is $15,000 if procured and performed domestically and $30,000 if procured or performed outside the United States. FAR 2.101 (2013).

C. Current Contingency Contracting Process

If a deployed unit identifies an urgent need for a certain supply or service, the unit point of contact would first have to develop an "acquisition ready requirements package" that described the requirement in sufficient detail for inclusion in a solicitation.[41] This involves developing "an independent government estimate and performance work statement (services) [or] statement of work (supplies and construction)" that is sufficiently detailed while avoiding a level of specificity that would cause problems during the competition phase of the solicitation or cause the government to assume risk for a failed project during performance or closeout.[42] This becomes an extremely difficult and inefficient task for a staff that is not trained in the intricacies of contract formation and has to reach out to non-organic, remotely located contracting assets for assistance.[43]

Once the solicitation package is appropriately reviewed and funded, it leaves the control of the operational unit and is sent to an element of the servicing contract support brigade.[44] The applicable contingency contracting team is then responsible for developing the appropriate contract instruments, conducting the solicitation, and finally awarding the contract.[45] The action, though, will be prioritized by the limited number of contracting personnel based upon the workload and complexity of the required contracting instrument and any packages containing "[i]nadequate descriptions are normally returned to the originator" without action, creating significant interoffice delays.[46]

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[41] FM 4-92, *supra* note 29, para. 2-18 (emphasis omitted); *see also* AR 715-9, *supra* note 39, para. 1-4(t)(1) (describing the requiring activity's responsibilities with respect to "acquisition ready requirements packages"); *id.* para. 2-4 (defining the required elements of the "acquisition ready requirements package").

[42] *See* FM 4-92, *supra* note 29, para. 2-18.

[43] *See supra* Part II.B (noting the remote and inorganic nature of the new contingency contracting force structure with respect to the requiring activities).

[44] FM 4-92, *supra* note 29, para. 2-21.

[45] *Id.*

[46] *See* U.S. DEP'T OF DEF., DEF. PROCUREMENT AND ACQUISITION POL'Y, DEFENSE CONTINGENCY CONTRACTING HANDBOOK 53 (2012) [hereinafter DCC HANDBOOK]; *see also* SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 10-005, IRAQ SECURITY FORCES FUND: WEAK CONTRACT OVERSIGHT ALLOWED POTENTIAL OVERCHARGES BY AECOM TO GO UNDETECTED (2009) (finding that the Army Contracting Command had inadequate personnel available to properly review invoices prior to disbursing over $567 million in funds).

Upon completion of the solicitation period, the contingency contracting officer will conduct the evaluation and source selection processes required under the Federal Acquisition Regulation (FAR),[47] again, in accordance with the workload priorities of the contingency contracting team itself. Once the contract is awarded, the unit assumes "responsibility" for the direct supervision of the contractor's performance through the appointment of a contracting officer's representative.[48] The contracting officer, working at the contingency contracting Team headquarters, will seldom become directly involved in routine contract performance supervision.[49] "The unit [Contracting Officer Representative] or receiving official is responsible to ensure delivery, receipt or acceptance of the service or commodity in accordance with the terms and conditions of the contract."[50] Once performance is completed or accepted, responsibility falls back to the contingency contracting team and the contracting officer must close out the contract and forward instructions to the financial management unit to disburse payment on the completed contract.[51] Under this model, even the simplest contract vehicles must travel through at least five layers of bureaucracy and be subject to the differing priorities of at least three separate chains of command, only one of which is a warfighting element.[52]

III. Continuing Lessons Learned

While a drastic improvement over the pre-Gansler state of contingency contracting,[53] the ECC model is an incomplete solution.

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[47] These vary significantly depending on the method of procurement: sealed bidding; negotiated procurement; or simplified acquisition. *See* FAR 13 (2013); *id.* 14; *id.* 15.

[48] FM 4-92, *supra* note 29, para. 2-22. Despite this doctrinal attempt to shift the burden of responsibility for contract supervision to the unit, the contracting officer remains legally responsible for the acceptance of contract performance. FAR 46.502. As the title of the Contracting Officer's Representative (COR) suggests, this individual must be appointed by the *contracting officer* and may only *assist* in the technical monitoring and administration of a contract. *Id.* 1.602-2(d); *id.* 1.604.

[49] DCC HANDBOOK, *supra* note 46, at 224–25 ("Contractor surveillance by contracting personnel under contingency conditions can be difficult because of ongoing military operations, local threat conditions, remote locations, broad customer bases, and time involved for performance and delivery.").

[50] FM 4-92, *supra* note 29, para. 2-23. *But see* discussion *supra* note 48.

[51] *Id.* para. 2-24.

[52] *See infra* Appendix A.

[53] *See* GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 23.

The Special Inspector General for Iraq Reconstruction (SIGIR), Special Inspector General for Afghanistan Reconstruction (SIGAR), and Department of Defense Inspector General have continued to update their contingency contracting reviews and, in 2011, the Commission on Wartime Contracting issued its final report.[54] Unfortunately, many of the Gansler Commission findings continue to be echoed.

As discussed below, pre-award planning continues to be a significant problem and a distinct lack of oversight continues to plague projects.[55] These performance failures suggest an enduring culture that, as the Gansler Commission noted years earlier, "does not sufficiently value or recognize the importance of contracting, contract management, and contractors in expeditionary operations"[56] and the overwhelming workload experienced by the workforce.[57]

A. Pre-Award Planning

The first step in the development of any contract, and often the beginning of the problems in contingency contracting, is initial planning and the identification of the requirements by the requiring activity.[58] Commanders and their staff must first consider whether a particular requirement is appropriate to delegate to a contractor. While the longstanding prohibition on contracting out inherently governmental functions is a starting point,[59] an analysis of operational and political risk is essential to the contingency contracting planning process.[60] One

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[54] CWC FINAL REPORT, *supra* note 3; s*ee, e.g.*, DOD IG 2012 UPDATE, *supra* note 6; *infra* Appendix C.

[55] *Compare* DOD IG 2012 UPDATE, *supra* note 6, at 4, CWC FINAL REPORT, *supra* note 3, at 1, *and infra* Appendix C, *with* GANSLER COMM'N REPORT, *supra* note 10, at 38.

[56] GANSLER COMM'N REPORT, *supra* note 10, at 9.

[57] *See* CWC FINAL REPORT, *supra* note 3, at 17; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-829T, WARFIGHTER SUPPORT: CULTURAL CHANGE NEEDED TO IMPROVE HOW DOD PLANS FOR AND MANAGES OPERATIONAL CONTRACT SUPPORT (2010).

[58] *See* FAR 2.101 (2013) ("'Acquisition planning' means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.").

[59] *Id.* 7.503(a).

[60] Operational risk comes in many forms and can most readily be seen in either degraded organic capabilities of the unit or through contractors gaining inappropriate influence as the sole conduit for continuity because of frequent and irregular government personnel rotations. *See* CWC FINAL REPORT, *supra* note 3, at 29. Political risk similarly comes in

particular facet of political risk that *must* be considered is the sustainability of the project once the contract has been performed. For instance, in Afghanistan:

> Massive expenditures are occurring in areas like security, counter-narcotics, and highway rehabilitation and road construction, mostly through the External Budget. In addition, social services like education and health are being sharply expanded. These investments and programs are creating substantial expenditure liabilities for the future—roads will need to be maintained, teachers paid, and the sustaining costs of the Afghan National Army (ANA) and other security services covered. The same will be true of investment programs in sectors like electric power and irrigation.[61]

Well intentioned projects, like those described above by the World Bank, can "be carefully planned, well executed, and economical, but still *become* wasteful if the host nation cannot provide trained staff, afford parts and fuel, perform necessary maintenance, or produce the intended outcome."[62] Both commanders and contracting officers have an interdependent duty to guard against this waste, but the current system, in an illogical fashion, divorces their consideration of the relevant factors. Commanders do not have the benefit of readily available contracting officer expertise on their staff and contracting officers do not have the benefit of firsthand knowledge of the operational environment and the commander's intent.

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many forms and can arise in the context of host nation inflation as a result of a rapid influx of capital, distorted economic activity that encouraged fraud, corruption, improper, and illegal behavior, and damage to U.S. and host nation government credibility. *Id.* at 29–30. The use of contract personnel can also significantly obscure the cost of war because military fatalities are widely reported in the U.S. media, but contractor fatalities tend to remain obscured under the surface. As of July 2011, while 4,464 military fatalities were recorded in Iraq, and additional 1,542 contractors were killed—a 34.5% increase. *Id.* at 31 ("Many foreign contractor employee deaths are believed not to have been officially reported by the firms that employed them. No definitive accounting for federal civilian-employee deaths in Iraq and Afghanistan has been located."). Similarly, 887 contractors were killed in Afghanistan in addition to the 1,667 military fatalities—a 53.2% increase. *Id.*

[61] WORLD BANK, REPORT NO. 34582-AF, AFGHANISTAN: MANAGING PUBLIC FINANCES FOR DEVELOPMENT 7–8 (2005).

[62] CWC FINAL REPORT, *supra* note 3, at 101. For example, see the SIGIR and SIGAR reports *supra* note 9.

The overarching purpose of this entire planning process is "to ensure that the government meets its needs in the most effective, economical, and timely manner."[63] It is essential that the unit's requirements are articulated in "clear, specific, and objective terms with measurable outcomes"[64] because they will become the basis for the entire contract. The Gansler Commission captured it best when it noted, "All too often, however, the inability to generate an effective contract statement of work is due to a lack of trained personnel who can translate their commander's intent into a requirement that can readily be given to and adopted by the contracting officer."[65] This failure to adequately definitize contracts leads to management and oversight difficulties, creating a situation ripe for fraud, waste, and abuse.[66]

B. Contract Performance Oversight

Contract administration problems have also persisted despite the systemic safeguards implemented by the stovepipe command and control environment of ECC.[67] The overwhelming workload and rotational nature of personnel assigned to contingency environments is one of the largest contributing factors to this dilemma.[68] Doctrine specifically acknowledges the likelihood that ECC elements will either not be available or will rotate on a different deployment cycle from their supported headquarters.[69]

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[63] FAR 7.102(b).
[64] DoD IG 2012 UPDATE, *supra* note 6, at iii.
[65] GANSLER COMM'N REPORT, *supra* note 10, at 40.
[66] CWC FINAL REPORT, *supra* note 3, at 81–83 (noting the abject failure of contracting officials to definitize the LOGCAP III ID/IQ contract and numerous related task orders awarded over a three year period from 2003 to 2005). The ECC structure continues to place this burden on the requiring activities which lack properly trained personnel that could foresee these difficulties and take appropriate action before the "acquisition ready requirements package" was finalized. *See supra* notes 41–43 and accompanying text.
[67] *See, e.g.*, *infra* Appendix C.
[68] CWC FINAL REPORT, *supra* note 3, at 84; *see, e.g.*, SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 08-019, OUTCOME, COST, AND OVERSIGHT OF THE SECURITY AND JUSTICE CONTRACT WITH PARSONS DELAWARE, INC. (2008) (finding contract management failures as a result of overwhelming workload and a turnover rate of eighteen contracting officers over a two-year period); SPECIAL INSPECTOR GEN. FOR IRAQ RECONSTRUCTION, AUDIT NO. 08-011, OUTCOME, COST, AND OVERSIGHT OF ELECTRICITY SECTOR RECONSTRUCTION CONTRACT WITH PERINI CORP. (2008) (finding contract management failures as a result of a turnover rate of 14 contracting officers over a 2.5-year period).
[69] FM 4-92, *supra* note 29, para. 1-15 ("When available ([Contingency Contracting

The high probability of desynchronized rotation and stationing among contracting personnel and their warfighting counterparts is extremely problematic for a variety of reasons. "Lessons learned were not applied [in Operation Iraqi Freedom and Operation Enduring Freedom] because United States personnel rotated frequently in and out of theater, staff at remote locations knew little about conditions on the ground, [and] hundreds of contracts were involved . . . ."[70] At the very least, this contributes to severe difficulty in record maintenance.[71]

Record maintenance is extremely important at *every* phase of contracting. "The head of the contracting office and contract administration office should maintain a contract file that contains records of all contractual actions taken during that contract."[72] Disjointed rotation of contracting personnel creates inherent risk that these files will not be properly maintained as contracting offices and warfighting units are relieved separately while contracts remain in effect, affecting continued contract administration, enforcement, and audit operations.[73]

C. Continuing Institutional Cultural Impediments

Beyond the continuing structural and procedural challenges, contingency contracting continues to be a misunderstood and poorly integrated Army function, despite the findings of the Gansler Report and the establishment of the Army Contracting Command and ECC.[74] This has occurred even with the overwhelming number and value of

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Battalions] may, or may not, be on the same deployment cycle as the corps [headquarters]) they will deploy in support of their aligned corps [headquarters]."); *id.* para. 1-17 ("When available ([Senior Contingency Contracting Teams] may, or may not, be on the same deployment cycle as the local division [headquarters]) the [Senior Contingency Contracting Team] team chief provides the division commander and staff operational contract support advice and serves as the ECC liaison officer to the division [headquarters].").

[70] CWC FINAL REPORT, *supra* note 3, at 84.

[71] *See infra* Appendix C.

[72] DoD IG 2012 UPDATE, *supra* note 6, at 7.

[73] *See, e.g.*, DCC HANDBOOK, *supra* note 46.

[74] *See* CWC FINAL REPORT, *supra* note 3, at 114 (citing DEF. SCI. BD. TASK FORCE, IMPROVEMENTS TO SERVICES CONTRACTING 9 (2011); CTR. FOR A NEW AM. SECURITY, CONTRACTING IN CONFLICTS: THE PATH TO REFORM 20–21 (2010); GANSLER REPORT, *supra* note 10, at 21–22, 29, 47). *But see* GAO WARFIGHTER SUPPORT REPORT 2013, *supra* note 7, at 23 (noting that the Army is well ahead of the other uniformed services with respect to the integration of contingency contracting into the operational force).

contingency contracts and the potential impacts of contract failure.[75] Despite the advent of ECC, "[s]hort deployment cycles in theater also put military and civil-service contract managers at a disadvantage vis-à-vis contractors, who are likely to have more continuity of knowledge of contracts and programs."[76] This problem is exacerbated by continued deployments that are off-cycle with supported commands and the lack of a habitual pre-deployment relationship between warfighting units and their supporting contracting teams. These cultural impediments directly relate to the unnecessarily divorced relationship between contingency contracting officers and their supported warfighting commanders.

IV. Contingency Contracting Delivery Redesign

The findings of the many commissions and inspectors general make it abundantly clear that a fundamental shift in Army culture must still occur with respect to contingency contracting.[77] While the establishment of ECC was a positive first step, it is an incomplete solution that treats contingency contracts of all stripes the same and continues to foist responsibility upon an Acquisition Corps inadequately resourced for execution and on warfighting commanders insufficiently integrated into the contingency contracting process.[78] The true power of ECC's concentration of contracting expertise and resources lies in its ability to properly conduct *complex* contracting operations.[79] As the Gansler Commission noted, "the simple items are not where the need for contracting skills lie."[80]

The Acquisition Corps and ECC should focus their skills and resources on the complex acquisitions that made up only fourteen percent of contracting actions, but accounted for seventy percent of

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[75] CWC FINAL REPORT, *supra* note 3, at 114 ("Agencies must fully accept contracting as a core function if only because of the sheer numbers of contingency contracts, their value, and the adverse financial, political, and operational impacts of failure.").
[76] *Id.* at 118.
[77] *See, e.g.*, *id.*; DOD IG 2012 UPDATE, *supra* note 6; GANSLER REPORT, *supra* note 10; *infra* Appendix C.
[78] *See supra* Parts I.C, II.
[79] *See supra* Part I.B.
[80] GANSLER COMM'N REPORT, *supra* note 10, at 26.

the obligated funds.[81] A fundamental contingency contracting delivery redesign should occur for simplified contingency contracts below the SAT. This proposal includes accepting simplified contingency contracting as a core function of the Logistics branch, fixing ultimate accountability for requirements definition and contractor oversight with the BCT commander, integrating a contracting officer into the BCT staff for sustainment planning and operations, and ensuring that these brigade contracting officers are properly trained to perform their duties and are integrated into unit training activities. The desired end state of this proposal is an organically sustainable and fully mission capable BCT that facilitates a fundamental shift in the Army's cultural attitude towards contingency contracting at the tactical level.[82]

A. Appropriate Limits: Simplified Acquisition Threshold

Most acquisitions made under the SAT use the simplified acquisition procedures available under FAR Part 13.[83] The simplified acquisition procedures exist in order to "allow the government to efficiently issue contracts for smaller acquisitions with simpler terms and conditions."[84] Among the most significant procedural simplifications are: (1) the requirement that the agency

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[81] *Id.*

[82] This proposal differs fundamentally from previous proposals advocating for the establishment of a new J-10 directorate at the Joint Staff level. *See, e.g.*, CWC FINAL REPORT, *supra* note 3, at 119. As the Joint Staff previously stated, a top-down J-10 solution is not feasible given current fiscal and operational constraints. *Id.* at 120. Rather, by approaching this problem from the bottom-up, there will likely be a far greater effect on the Army's cultural perception of contingency contracting. This will occur at the tactical level, where results can be seen almost immediately without the establishment of a burdensome new bureaucracy that would likely compete with the existing contracting force structure.

[83] FAR 13.003(a) (2013) ("Agencies shall use simplified acquisition procedures to the maximum extent practicable for all purchased of supplies or services not exceeding the simplified acquisition threshold . . . .").

[84] JOHN CIBINIC, JR., ET AL., FORMATION OF GOVERNMENT CONTRACTS 1027 (4th ed. 2011); *see also* FAR 13.002 ("The purpose of this part is to prescribe simplified acquisition procedures in order to—(a) Reduce administrative costs; (b) Improve opportunities for [socio-economically disadvantaged businesses]; (c) Promote efficiency and in contracting; and (d) Avoid unnecessary burdens for agencies and contractors.").

must only make *reasonable efforts* to obtain competition;[85] (2) reduced publication timelines;[86] and (3) simplified evaluation procedures.[87] The FAR sets the SAT for contingency acquisitions at three-hundred thousand dollars, if awarded, performed, or purchased domestically, and at one million dollars, if awarded, performed, or purchased outside the United States.[88]

Since contracting officers are already required to be appointed by the Head of Contracting Activity in writing with specific limits defined in their warrants,[89] the SAT is a reasonable level at which to set those limits. There is very little need for a brigade contracting officer's warrant to exceed the SAT because a BCT is a relatively small unit with inherent fiscal limitations.[90] This will give BCT commanders the flexibility necessary to meet the majority of the BCT's contingency contracting needs while placing responsible limits on that ability, thereby minimizing the risk associated with assigning a non-Acquisition Corps officer in this role.

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[85] B&S Transport, Inc., B-407589, Dec. 27, 2012, 2012 CPD ¶ 354, at 2 (citing 10 U.S.C. § 2304(g)(3) (2012); SDM Supply, Inc., B-271492, June 26, 1996, 96-1 CPD ¶ 288, at 4) ("When using simplified acquisition procedures, agencies must promote competition to the maximum extent possible. In meeting this requirement, agencies must make reasonable efforts, consistent with efficiency and economy, to afford all eligible and interested vendors and opportunity to compete.").

[86] *See* FAR 5.201(b)(1)(i); *id.* 5.203(b).

[87] *See id.* 13.106-2(b) (noting that FAR Part 14 and 15 procedures are not mandatory under simplified acquisition procedures).

[88] *Id.* 2.101. The Commercial Items Test Program raises this limit to $6.5 million (if procured or performed in in the United States) and $12 million (if procured or performed outside the United States) for commercial item contracts. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 822, 126 Stat. 1632, 1830 (2013); *see* FAR 2.101 (defining "commercial items"). Due to the realistic fiscal limitations of the BCT's budget, however, it is unlikely that a brigade contracting officer would need a warrant up to these amounts.

[89] *See* FAR 1.602.

[90] *See, e.g.*, U.S. FORCES AFGHANISTAN, PUB. 1-06, MONEY AS A WEAPON SYSTEM AFGHANISTAN 19 (Mar. 2012) (defining $500,000 as the maximum approval threshold for brigade-level commanders).

B. Logistics Branch Integration

Military reliance on contract logistical support will only increase as organic logistical assets continue to be cannibalized in order to maintain the warfighting capability of an Army in the midst of another round of downsizing and reorganization.[91] This is especially true of our modular deployable BCTs. As the basic self-sustaining Army maneuver unit, a BCT committed independently will struggle in any contingency environment without an organic capability to execute small local support contracts.[92]

While the Acquisitions Corps is the subject matter expert for contract procurements,[93] they need not be the only participants in the contracting mission during contingency operations. The first and foremost way to effect change in Army culture regarding contingency contracting is to accept it as a core function of a basic branch. Given the overwhelmingly logistical nature of the contingency contracting mission, the Logistics branch is the natural choice. As subject matter experts in the logistics field, these officers are uniquely suited to effectively serve as small-scale contingency contracting officers. Marrying the subject matter expertise in logistics with training in simplified contract formation is a common sense approach, ensuring that this blend of capabilities is brought to bear on the entire process from the initial planning phases through contract closeout.[94]

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[91] *See* Bacon, *supra* note 4.

[92] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 3-90.6, BRIGADE COMBAT TEAM para. 1-1 (14 Sept. 2010) [hereinafter FM 3-90.6].

[93] U.S. DEP'T OF DEF., INSTR. 5000.66, OPERATION OF THE DEFENSE ACQUISITION, TECHNOLOGY, AND LOGISTICS WORKFORCE EDUCATION, TRAINING, AND CAREER DEVELOPMENT PROGRAM para. E.2.3.1 (21 Dec. 2005) [hereinafter DODI 5000.66] ("The purpose of the Acquisition Corps is to create a pool of highly qualified . . . personnel to fill [critical acquisition positions (CAP)]."); U.S. DEP'T OF ARMY, PAM. 600-3, COMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT AND CAREER MANAGEMENT 391 (1 Feb. 2010) [hereinafter DA PAM. 600-3]; *see also* 10 U.S.C. § 1733 (2012) (noting CAP are positions dealing with acquisitions over the SAT).

[94] At a minimum, these officers must be required to have:

> (1) complet[ed] at least 24 semester hours or the equivalent of study from an accredited institution of higher education or similar educational intuition in any of the disciplines of accounting, business,

Moreover, Acquisition Corps officers are simply not the experts in logistical functions.[95] The Acquisition Corps is a functional area drawn from the Army-at-large and intended for large-scale acquisition missions requiring complex contract instruments.[96] Once transferred to the Acquisition Corps, officers do not return to or receive any additional training from their basic branches.[97] Since eighty-six percent of all contingency contracting occurs below the SAT,[98] and given the vastly less complicated contracting procedures involved, personnel well versed in

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> finance, law, contracts, purchasing, economics, industrial management, marketing, quantitative methods, or organization and management; or
>
> (2) pass[ed] an examination that demonstrates skills, knowledge, or abilities comparable to that of an individual who has completed at least 24 semester credit hours or the equivalent of study in any of the disciplines described in paragraph (1).

10 U.S.C. § 1724(f) (describing the minimum qualifications for personnel serving as a member of the Contingency Contracting Force (CCF)). There is no required formal contracting coursework or contracting experience necessary for contracting officers working below the SAT. DODI 5000.6, *supra* note 93, para. E.6. Prior to deployment CCF personnel should have minimal training in: "Government contract principles, simplified acquisition procedures, contingency contracting and Government purchase card . . . ." *Id.* para. E.6.2.4.1. Anecdotal arguments that the military lacks sufficiently talented logistics personnel for this task are without merit. The Logistics Corps boasts a plethora of the finest and most experienced logisticians in the world. *See* Jim Garamone, *Military Logistics Is Strained, But Healthy, Official Says*, U.S. DEP'T OF DEF., Jan. 10, 2012, http://www.defense.gov/News/NewsArticle.aspx?ID=66743. Ensuring that the best and brightest are assigned to these mission essential contingency contracting billets is certainly a personnel management challenge, but not an insurmountable one.

[95] *See* DA PAM. 600-3, *supra* note 93, para. 35-2c ("Logistics branch officers . . . require extensive knowledge and experience in planning, preparing, executing, and assessing the sustainment warfighting function logistics . . . . Logistics tasks include supply, field services, transportation, maintenance, distribution management, contracting, and related general engineering.").

[96] *See id.* para. 42-1.

[97] *See, e.g.*, *id.* para. 35-4a(3) ("For example, many logistics officers apply to the Acquisition Corps (FA 51). . . . However, once officers are accepted into another FA designation, such as FA 51, they will not return to the Logistics branch nor will they be eligible to command logistics units.").

[98] GANSLER COMM'N REPORT, *supra* note 10, at 26 (noting that eighty-six percent of contingency contracting actions occur below the Simplified Acquisition Threshold, accounting for only thirty percent of the money spent in contingency contracting through Joint Contracting Command–Iraq/Afghanistan).

logistical matters are better suited for the majority of these small-scale contingency contracting missions.

Experience and maturity are essential to thorough and professional contract formation, administration, and termination.[99] This is especially true because the contracting officer serves as the ultimate supervisor for contract performance.[100] An ideal formal entry point into warranted service as a brigade contracting officer is a successful post-command Logistics Corps captain on track to assume duties as a brigade S4, brigade support operations officer, or battalion executive officer, following Intermediate Level Education.

The Logistics branch should make a concerted effort to favor those with contracting experience for service in key and developmental positions at the rank of major and beyond. Given the universal importance of contingency contracting, emphasis must be placed on it as a key logistics function. Service as a brigade contracting officer must be marketed as a highly competitive, career-enhancing opportunity affording unique leadership challenges that are an invaluable experience for any future logistics commander or key billet staff officer.

C. Accountability and Staff Integration

According to AR 600-20, "Commanders are responsible for everything their command does or fails to do."[101] That should not change with respect to contingency contracting given the pervasive role it plays in contingency operations of all types. By integrating the contracting officers responsible for eighty-six percent of contingency contracting directly onto the staff of warfighting commanders, the Army will remove any confusion as to who is ultimately responsible for these small-scale contracting operations

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[99] *See* GANSLER COMM'N REPORT, *supra* note 10, at 4.
[100] FAR 46.103(d) (2013); DCC HANDBOOK, *supra* note 46, at 227.
[101] U.S. DEPT. OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 2-16 (18 Mar. 2008).

and push responsibility directly into the operational chain of command.

Moreover, the maintenance of contract records by personnel regularly assigned to the unit occupying battlespace in a contingency operation will alleviate a significant amount of confusion about who bears the responsibility for maintaining the required documentation. The bottom line is that the brigade contracting officer will be responsible for maintaining a complete contract file for all contracts the unit procures or administers and commanders will be ultimately responsible for ensuring that all of these files are appropriately maintained and available for contract closeout actions and future audit activities.

To this end, the brigade contracting officer best serves as an enabling asset under the brigade S4. As the primary staff officer responsible for logistics coordination, the S4 will need to exercise direct oversight of the brigade contracting officer during the planning and execution phase of any contingency operation involving contracted assets in order to ensure that the efforts provided under contract are properly synchronized with the other logistical lines of effort.[102] The brigade contracting officer will be an invaluable voice in the sustainment cell and in the plans and operations working groups, in addition to being responsible for drafting the Contract Support Annex to unit operations orders.[103] This will bring a new level of visibility, attention, and understanding to contracting operations executed within the BCT's area of responsibility.

This tactical and technical oversight of the logistical assets that the Brigade contracting officer can provide should not be confused, however, with the brigade contracting officer's independent

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[102] This avoids many of the coordination challenges that would arise at the tactical level if a separate S-10 staff section was established under the J-10 directorate proposal. *See* discussion, *supra* note 82.

[103] *See* FM 3-90.6, *supra* note 92, paras. 1-111 to 1-134. Moreover, while operational contract support planning has been regulatorily integrated into corps and division-level planning processes, the same cannot be said for the Army's basic independently deployable unit: the BCT. *See* AR 715-9, *supra* note 39, para. 2-2.

warranted contracting authority.[104] The brigade contracting officer must be able to conduct the technical contracting process in accordance with all applicable regulations and policy and be free from external influence.[105] To ensure that this independence is maintained and that high quality contracting services are provided to the command, a technical chain should be utilized to provide that technical contract support to the brigade contracting officer. Similar to that of the brigade judge advocate, the brigade contracting officer should be dually supervised and evaluated by both the unit and by a representative of the servicing contracting support brigade.[106] This direct input from the technical chain would serve two very important purposes: (1) to provide advice, training, and support to the brigade contracting officer; and (2) to serve as a check on the system, ensuring that fraud, waste, and abuse are minimized in the contingency contracting process.

By routing the majority of the simplified contingency contracting mission through this brigade-level staff officer, the process will also become truly simplified and require much less interoffice bureaucracy. The unit, and more specifically the brigade contracting officer, will assume all of the major contract formation and administrative duties, except for funds management.[107] This will create a far more responsive system that can be tailored to the BCT commander's intent and will more readily respond to the dynamic evolution of future contingency operations.

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[104] *See* FM 4-92, *supra* note 29, para. 1-20.

[105] *See* FAR 15.308 (2013) (mandating that the source selection decision be based on the *independent* judgment of the Source Selection Authority). In acquisitions under the SAT, the contracting officer serves as the Source Selection Authority unless other procedures are mandated by service or unit policy. *See id.* 13.106-2.

[106] *See* U.S. DEP'T OF ARMY, REG. 623-3, EVALUATION REPORTING SYSTEM paras. 2-22, D-2d (5 June 2012).

[107] *See infra* Appendix B.

D. Training

As an early exposure point, all Logistics Corps officers should receive training on contract formation and administration in their Officer Basic Course and Captains Career Course curriculum. Early academic exposure is essential and will enable young staff officers to more fully participate in the staff planning process and mission execution. Those selected to serve as brigade contracting officers should receive additional training at the Defense Acquisition University in order to become certified to hold a contracting warrant limited to the SAT.[108] Utilization following this training should be mandatory and tantamount to a utilization tour after a program like the School of Advanced Military Studies.

By ensuring that the brigade contracting officers are academically trained to conduct contingency contracting in simplified acquisition situations, the contingency contracting process can be fully integrated into brigade-level field training exercises, mission rehearsal exercises, and command post exercises.[109] Commanders and fellow staff officers will be able to rehearse with the brigade contracting officer as a member of the combined arms team and better understand the force multiplier that contingency contracting brings to the fight. Organic relationships amongst all players will have the opportunity to develop *prior* to deployment and contingency contracting operations will be better tailored to the commander's intent, thereby dramatically shifting cultural perceptions.

V. Conclusion

According to the Gansler Commission, as the U.S. military entered the 21st century, its previous "expeditionary experiences in

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[108] *See generally* DODI 5000.66, *supra* note 93, para. E.2.2.7.1 (describing the three contracting certification levels); DEF. ACQUISITION UNIV., http://www.dau.mil/ (last visited Mar. 15, 2013).

[109] As mentioned earlier, current regulations and doctrine do not mandate, or even address, the participation of contracting support brigadeelements in warfighting unit training exercises. *See* discussion *supra* note 39.

Haiti, Bosnia, and Kosovo had not been leveraged into building an operational or institutional capability to support the next military operation."[110] We cannot afford to repeat this same mistake with our experiences in Iraq and Afghanistan. The present contracting force structure, with the advent of ECC, is only a partial solution to the contingency contracting problems that have occurred over the past decade. This centralized, stove-pipe contracting support structure is ideal for the complex, high-value projects that account for over seventy percent of the dollars spent in Iraq and Afghanistan.[111] It ensures that a highly qualified team of contracting experts properly execute the complex contracting mission that these projects demand.

Those missions, however, only account for fourteen percent of the overall contingency contracting mission.[112] A stunning eighty-six percent of the contracting mission in the modern contingency environment occurs below the SAT.[113] Mixing the very large number of simplified acquisitions needed by warfighting commanders with the limited number of highly complex and expensive projects does an incredible disservice to the entire contingency contracting mission by overwhelming the acquisition professionals who should dedicate their expertise to the more complex projects.

Rather, the Army should embrace the decentralized modular brigade concept and staff every BCT with an organic brigade contracting officer, thereby enabling the BCT commander to truly assume full-spectrum responsibility for the accomplishment of the brigade's assigned contingency mission. Ultimately, this proposal has the potential to integrate contingency contracting into the Army's culture at the *tactical* level, fostering the fundamental cultural shift called for by numerous reports, audits, and commissions.

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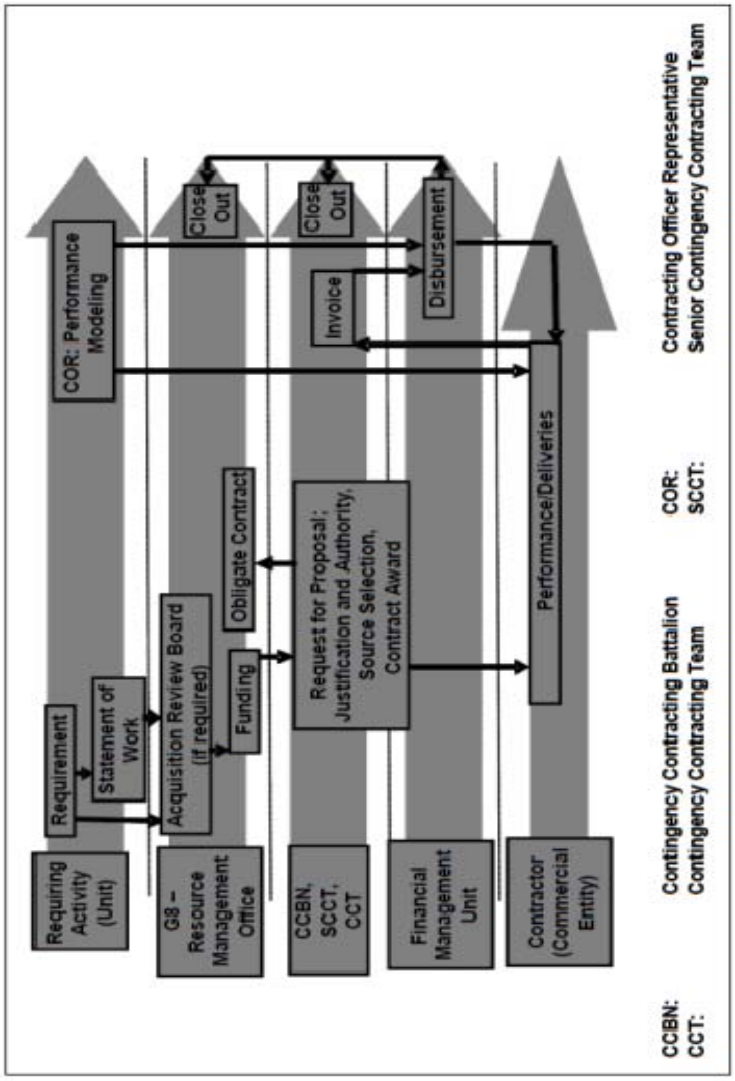
[110] GANSLER COMM'N REPORT, *supra* note 10, at 16.
[111] *See id.* at 26.
[112] *Id.*
[113] *Id.*

Appendix A

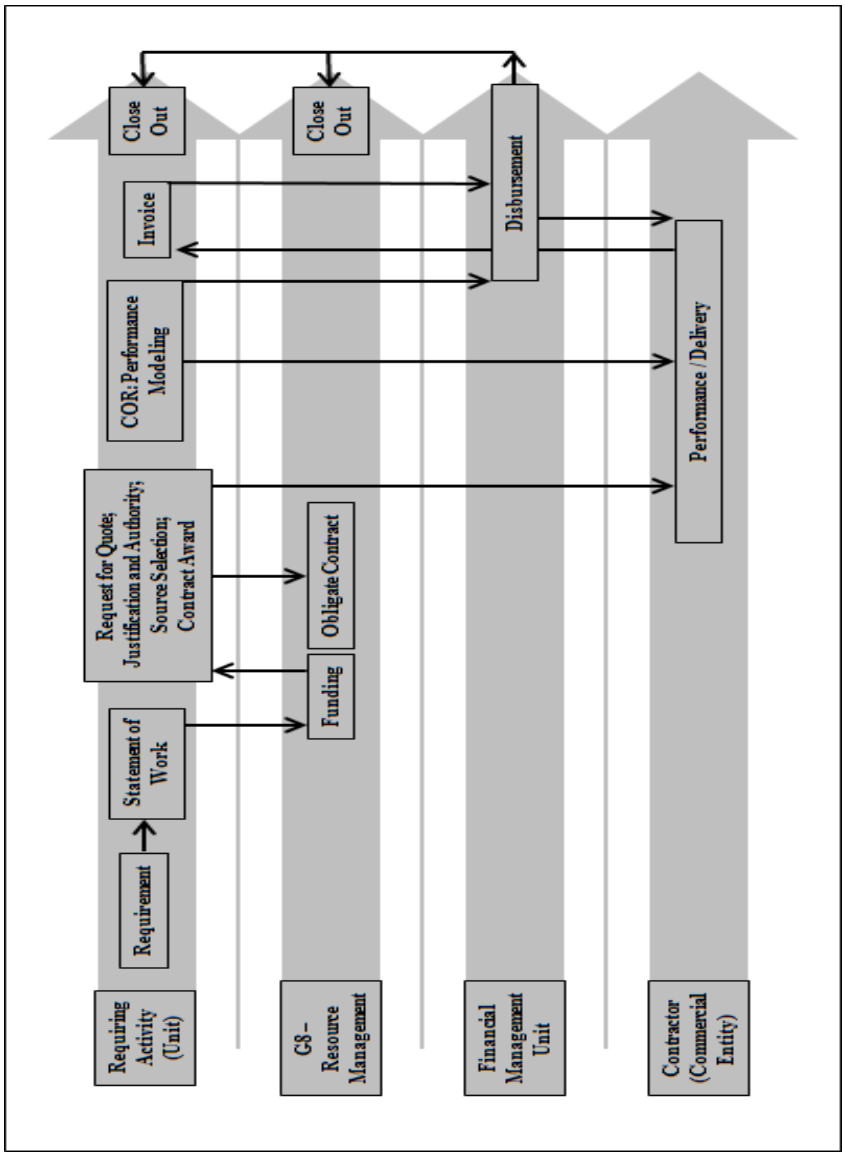
Contract Workflow: Contracting Support Brigade[1]



[1] FM 4-92, *supra* note 29, fig.2-2, at 2-6.

Appendix B

Contract Workflow Contingency Contracting Redesign



Appendix C

Survey of Negative Contingency Contracting Audit Findings

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency					
				Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained
Jul-04	SIGIR	04-011	LOGCAP K for CPA Property Accountability					X	
Jul-04	SIGIR	04-003	LOGCAP K FDC Operations Kuwait	X				X	
Jul-04	SIGIR	04-004	AFCEE role in reconstruction K						
Jul-04	SIGIR	04-005	Award of sector construction projects					X	
Jul-04	SIGIR	04-013	CPA Contracting Procedures			X	X	X	X
Oct-04	SIGIR	05-002	LOGCAP K for CPA Property Accountability					X	
Nov-04	SIGIR	05-003	LOGCAP Task Order 44	X	X			X	
Apr-05	SIGIR	05-005	Safety and Security K					X	X
Apr-05	SIGIR	05-007	Iraq Relief/Reconstruction Fund K Administration					X	X
Apr-05	SIGIR	05-008	Development Fund for Iraq K Administration					X	X
Jul-05	SIGIR	PA-05-001	Al Wahada Water Treatment Plant			X		X	X
Jul-05	SIGIR	PA-05-002	Al Wathba Water Treatment Plant					X	X
Jul-05	SIGIR	05-010	PCO/JCC-I Award Fee Process	X				X	X
Jul-05	SIGIR	PA-05-004	Al Sumelat Water Network					X	
Sep-05	SIGIR	05-013	Equipment Controls for Security Contractors	X				X	
Oct-05	SIGIR	05-018	Armored Vehicle Purchase	X		X		X	
Oct-05	SIGIR	05-016	Babylon Police Academy Const./Operation K	X	X			X	X
Oct-05	SIGIR	05-020	Karbala Library Rehabilitation	X	X			X	X
Oct-05	SIGIR	PA-2005-016	Primary Healthcenter/Maternity Hosp. Rehab.	X				X	
Oct-05	SIGIR	PA-2005-019	Railway Station Rehabilitation in Central Iraq					X	
Jan-06	SIGIR	PA-05-032	Hilla Police Academy					X	
Jan-06	SIGIR	PA-2005-001	Horizontal Directional Drilling Project	X		X		X	
Jan-06	SIGIR	PA 05-021–24	Sulaymaniyah Border Forts					X	
Jan-06	SIGIR	PA 05-029	Qudas Gas Turbine	X					
Jan-06	SIGIR	PA 2005-025	Um Qasr Ammunition Supply Point	X					
Jan-06	SIGIR	PA 2005-027	Port of Um Qasr Security Upgrades	X					
Jan-06	SIGIR	PA 2005-018	Hilla SWAT Police Station			X		X	
Apr-06	SIGIR	06-009	Task Force Shield (Oil and Electrical Security Forces)					X	X
Apr-06	SIGIR	06-010/06-015	IAF Seized Asset Fund	X				X	X
Apr-06	SIGIR	06-011	Primary Healthcare Center Const.	X				X	
Apr-06	SIGIR	06-016	Primary Healthcare Center Equip.					X	
Apr-06	SIGIR	PA-2006-035	Ninewa Village Roads	X					
Apr-06	SIGIR	PA-2006-036	Fire Station Construction					X	X
Apr-06	SIGIR	PA-06-040	Aviation Base Construction					X	
Jul-06	SIGIR	06-020	Advanced First Responder Network	X				X	
Jul-06	SIGIR	PA-06-063, PA-05-013, -014	Oil Pipeline Projects					X	X
Jul-06	SIGIR	PA-06-049	Basrah Airport Terminal and Tower Renovation	X					
Jul-06	SIGIR	PA-06-051	Safwan Police Station Construction	X					X
Jul-06	SIGIR	PA-06-053	Nasiriyah Fire Station Construction						X

				Area of Identified Contracting Deficiency					
Date	Agency	Report	Description of Contract Area Reviewed	Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained
Jul-06	SIGIR	PA-06-054	Nasiriyah Prison Expansion					X	
Jul-06	SIGIR	PA-06-055	Muthanna Village Roads						X
Jul-06	SIGIR	PA-06-057	Baghdad Railway Station Rehabilitation	X					
Oct-06	SIGIR	06-028	Iraq Reconstruction Admin. Task Orders						X
Oct-06	SIGIR	06-033	ISF Weapons Procurement					X	X
Oct-06	SIGIR	PA-06-067	Baghdad Municipal Solid Waste Landfill	X					
Oct-06	SIGIR	PA-06-069	Al Kut Training Academy					X	
Oct-06	SIGIR	PA-06-072	Ninewa Police Headquarters					X	X
Jan-07	SIGIR	06-029	Iraqi Police Training Program Support Task Order					X	X
Jan-07	SIGIR	PA-06-074	Al Kasik Waste Water Treatment Plant	X					
Jan-07	SIGIR	PA-06-075	Iraqi Army Brigade Barracks	X					
Jan-07	SIGIR	PA-06-077	Iraqi Army Battalion Barracks	X				X	
Jan-07	SIGIR	PA-06-078.2, -079.2 PA-06-078.1, -079.1 (Oct 06)	Baghdad Police College					X	
Apr-07	SIGIR	PA-06-087, -088	Tallil Military Base					X	
Apr-07	SIGIR	PA-06-089	Al Hilla Recruiting Center					X	X
Apr-07	SIGIR	PA-06-090	Baghdad Civil Defense Headquarters					X	X
Apr-07	SIGIR	PA-06-091	Bab Shams Police Station					X	X
Jun-07	SIGIR	07-009	Iraq Reconstruction Contract, Phase II	X		X		X	
Jun-07	SIGIR	07-001	LOGCAP Task Order 130					X	X
Oct-07	SIGIR	07-105	Mosul Dam Relief and Reconstruction	X				X	X
Jan-08	SIGIR	08-004	Taji Military Base and Baghdad Recruiting Center					X	
Jan-08	SIGIR	08-010	Iraq Reconstruction K	X				X	
Jan-08	SIGIR	PA-07-111	Mansour Pump Station Rehabilitation	X				X	
Jan-08	SIGIR	PA-07-112	Mahalla Sewer Collapse Project					X	
Jan-08	SIGIR	PA-07-118, -118.1 (Apr 08)	Al Ghazaliya Sewage Lift Station Repair	X				X	X
Apr-08	SIGIR	08-011	Energy Sector Reconstruction Ks					X	X
Apr-08	SIGIR	PA-08-120	Sarwaran Primary School	X			X		X
Apr-08	SIGIR	PA-08-121	Binaslawa Middle School	X					X
Jul-08	SIGIR	08-018	Water Sector Reconstruction Ks	X				X	
Jul-08	SIGIR	08-019	Security and Justice Ks					X	X
Jul-08	SIGIR	PA-08-138	Kahn Bani Sa'ad Correctional Facility	X				X	
Jul-08	SIGIR	PA-08-124	Al Shofa Water Facility			X		X	X
Jul-08	SIGIR	PA-08-125	Al Kazim Water Supply					X	X
Jul-08	SIGIR	PA-08-127	33-kV Power Line					X	X
Jul-08	SIGIR	PA-08-129	Al Ager Water Compact Unit					X	X
Oct-08	SIGIR	PA-08-144 thru -148	Falluja Waste Water Treatment System	X					
Oct-08	SIGIR	PA-08-149 thru -151	Al Quds, Al Mualameen, Al Faoo Schools	X				X	
Jan-09	SIGIR	09-010	Security Services Ks						X

				Area of Identified Contracting Deficiency					
Date	Agency	Report	Description of Contract Area Reviewed	Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained
Jan-09	SIGIR	PA-08-134	Haditha Primary Healthcare Center						X
Jan-09	SIGIR	PA-08-141	Al Iqitadar School	X					
Jan-09	SIGIR	PA-08-142	Al Shurhabil School	X					
Jan-09	SIGIR	PA-08-153	Ramadi 132kV Substation					X	
Apr-09	SIGIR	09-014	Security Forces Logistics Ks	X				X	X
Apr-09	SIGIR	09-017	Internal Security Services Ks					X	
Apr-09	SIGIR	PA-08-135	Suroor Elementary School Rehabilitation	X					
Apr-09	SIGIR	PA-08-140	Rebuilding of the Sagrah School	X					X
Apr-09	SIGIR	PA-08-157	Shiqaq Hai Musalla Primary Healthcare Center						X
Apr-09	SIGIR	PA-08-158	Hai Tiseen Primary Healthcare Center						X
Apr-09	SIGIR	PA-08-159, -169	Basrah Courthouse and Witness Protection Facility						X
Jul-09	SIGIR	09-021	Personal Protective Services Task Orders					X	X
Jul-09	SIGIR	09-026	BIA Caravan Hotel	X				X	X
Jul-09	SIGIR	PA-08-162	Port of Umm Qasr Roll-On/Roll-Off Berth						X
Jul-09	SIGIR	PA-08-164	Iraqi Army Brigade Barracks	X					X
Jul-09	SIGIR	PA-08-165, -167	Missan Surgical Hospital					X	X
Jul-09	SIGIR	PA-09-170	Mujarrah Canal Bridge					X	
Jul-09	SIGAR	Audit 09-1	CSTC-A Oversight Capabilities					X	
Jul-09	SIGAR	Inspection 09-01	Khowst City Power System	X				X	X
Oct-09	SIGIR	10-001	Iraqi Security Forces Facility Ks	X				X	
Oct-09	SIGIR	10-005	Global Maintenance and Supply Svc K					X	
Oct-09	SIGIR	08-166	Secure Document Storage Facility					X	X
Oct-09	SIGIR	PA-09-177	Chamchamal Correctional Facility Renovation	X					
Oct-09	SIGAR	Audit 09-05	CERP Project Management					X	X
Oct-09	SIGAR	Inspection 09-02	Mahmood Raqi to Nijrab Road	X					
Oct-09	SIGAR	Inspection 10-01	Farukh Shah School Construction	X				X	
Oct-09	SIGAR	Inspection 10-02	Manan Secondary School Construction	X			X	X	
Oct-09	SIGAR	Inspection 10-03	Habib Rahman Secondary School Construction	X				X	X
Oct-09	SIGAR	Inspection 10-04	Kohi Girls' School Construction	X					
Jan-10	SIGIR	10-007	Various (1x ID/IQ; 2x FFP)	X					X
Jan-10	SIGIR	PA-09-168	Iraqi Tomb of the Unknown Soldier	X				X	X
Jan-10	SIGIR	PA-09-172	Abu Ghraib Dairy	X					
Jan-10	SIGIR	PA-08-173	Rabeaa Point of Entry Screening Facility					X	
Jan-10	SIGIR	PA-09-174	Hammam Al Alil Division Training Center					X	
Jan-10	SIGAR	Audit 10-06	Kabul Power Plant	X				X	
Apr-10	SIGIR	10-013	Baghdad Airport CERP Projects	X				X	X
Apr-10	SIGIR	PA-09-189	Basrah Modern Slaughterhouse	X					
Apr-10	SIGIR	PA-09-192	Haditha Dam Perimeter Security					X	
Apr-10	SIGAR	Audit 10-09	Kunduz ANA Garrison Construction	X				X	X

Date	Agency	Report	Description of Contract Area Reviewed	Area of Identified Contracting Deficiency					
				Definition & Planning	Solicitation Process	Proposal Evaluation	Award Decision	Management Oversight	Records Maintained
Apr-10	SIGAR	Audit 10-10	Gamberi ANA Garrison Construction	X					
Apr-10	SIGAR	Audit 10-07	Tojg Bridge Construction	X				X	X
Jul-10	SIGIR	10-021	Iraq Reconstruction Program Records						X
Jul-10	SIGAR	Audit 10-12	Kandahar ANP Compound Construction	X				X	X
Jul-10	SIGAR	Audit 10-14	Farah ANA Garrison Construction	X					
Oct-10	SIGAR	Audit 11-03	ANP District Headquarters Construction	X				X	
Jan-11	SIGIR	11-009	Iraqi International Academy	X					
Jan-11	SIGAR	Audit 11-07	Laghman Province CERP Projects	X				X	X
Apr-11	SIGIR	11-011	Quick Response Fund Ks						X
Apr-11	SIGIR	11-016	USACE K Management						X
Apr-11	SIGAR	Audit 11-09	Mazar-e Sharif and Heart ANA Facility Construction	X				X	X
Jul-11	SIGIR	11-018	Internal Security Services Ks					X	X
Jul-11	SIGIR	11-022	ISF Supply/Equipment RSOI					X	
Oct-11	SIGAR	Audit 12-02	Kabul Military Training Center Construction	X				X	X
Oct-11	SIGAR	Audit 12-03	Afghan Nat'l Security University Construction	X					X
Oct-12	SIGIR	13-003	Development Fund for Iraq					X	X
			Total Identified Deficiencies:	66	3	7	3	91	65

The foregoing survey was compiled from the Audits and Inspections performed by the Special Inspector General for Iraq Reconstruction (SIGIR) and the Special Inspector General for Afghanistan Reconstruction (SIGAR) completed through December 2012. The "Areas of Identified Contracting Deficiency" have been simplified and aligned with the major stages of the contracting process for ease of reference. For instance, "Definition & Planning" encompasses, among other things, design planning failures, sustainability planning omissions, and inadequate contract definitization. The reports included above are those that, in the author's opinion, clearly identified significant contracting deficiencies not otherwise reported.

THE EFFECTS OF CHINA'S RISING LEGAL INFLUENCE IN AFRICA ON AFRICOM'S STRATEGIC OBJECTIVES

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The twenty-first century is the century for China to lead the world. And when you are leading the world, we [Africans] want to be close behind you. When you are going to the moon, we don't want to be left behind.[1]

I. Introduction: China's Rising Influence in Africa

China is increasing its political, economic, and legal association within the continent of Africa.[2] The engagement between China and Africa is not a recent development. History suggests that elephant ivory and wood from Africa was being shipped into southern China as early as

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[1] *See* SERGE MICHEL & MICHEAL BEURET, CHINA SAFARI, ON THE TRAIL OF BEIJING'S EXPANSION IN AFRICA 11 (2009) (quoting Nigerian President Olusegun Obasanjo to Chinese President Hu Jintao on April 2006, in Lagos, Nigeria).

[2] *See* DAVID E. BROWN, HIDDEN DRAGON, CROUCHING LION: HOW CHINA'S ADVANCE IN AFRICA IS UNDERESTIMATED AND AFRICA'S POTENTIAL UNDERAPPRECIATED 34 (2012).

the eleventh century.[3] The interesting issue lies in the rapid acceleration by China into international and domestic legal systems within the African continent over the last twenty years.[4]

Scholars debate the effects of this association on African economic and legal systems. Some suggest that Chinese intentions are ultimately aimed at extracting the wealth of natural resources from Africa as efficiently as possible, with little concern for the prosperity or welfare of the African people.[5] On the other hand, some scholars suggest that China's incursions into the inner regions of the continent, though driven by the desire for economic growth, are not as nefarious as they appear, nor are they adverse to the well-being of the African people.[6] Regardless of its motives, China's rising influence affects international law and domestic African law. Much ink has been spilled over China's increased interaction with Africa, but China is not alone in its attempts to connect with the continent.

President George W. Bush created the United States Africa Command (AFRICOM) in 2007.[7] In a posture statement by General Carter Ham[8] on February 29, 2012, to the House Armed Services Committee, General Ham described the mission of AFRICOM[9] as follows:

> Africa Command protects and defends the national security interests of the United States by strengthening the defense capabilities of African states and regional

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[3] Robert I. Rotberg, *Preface* to CHINA INTO AFRICA, TRADE AID, AND INFLUENCE, at vii (Robert I. Rotberg ed., 2008).

[4] *See* CHRIS ALDEN, CHINA IN AFRICA 12 (2007).

[5] Firoze Manji, *Preface* to AFRICAN PERSPECTIVES ON CHINA IN AFRICA, at vii (Firoze Manji & Stephen Marks eds., 2007).

[6] DEBORAH BRAUTIGAM, THE DRAGON'S GIFT, THE REAL STORY OF CHINA IN AFRICA 21 (2009). "From the evidence, China's aid does *not* seem to be particularly 'toxic'; the Chinese do not seem to make governance worse, and although it is probably believed that aid comes with "no strings attached," economic engagement usually *does* come with conditions, some of it even (indirectly) governance-related." *Id.* at 21.

[7] David J. Francis, *Introduction* to US STRATEGY IN AFRICA: AFRICOM, TERRORISM, AND SECURITY CHALLENGES 3 (David J. Francis ed., 2010).

[8] *United States Africa Command (AFRICOM) Commander's Biography*, AFRICOM.MIL (Nov. 21, 2012, 12:07 PM), http://www.africom.mil/GenCarterHam.asp. General Carter Ham, U.S. Army, assumed command of AFRICOM on March 9, 2011. *Id.*

[9] *United States Africa Command (AFRICOM) Commander's Biography*, AFRICOM.MIL (May 29, 2014, 2:40 PM), http://www.africom.mil/about-the- command/leadership/commander. General David Rodriguez assumed command of AFRCOM on April 15, 2014.

> organizations and, when directed, conducts military operations, in order to deter and defeat transnational threats and to provide a security environment conducive to good governance and development.[10]

Not unlike China's efforts at piercing the veil of the African continent, the United States' establishment of AFRICOM has been largely met with hostility and disdain by the global community.[11] Some see the establishment of AFRICOM as an extension of alleged U.S. colonialism,[12] while others view its creation as a riposte to China's increased presence in the region.[13] The United States has staunchly maintained its position that AFRICOM is about promoting U.S. security interest through stability[14] and good local governance[15] in Africa, and not about staking a claim. In fact, the headquarters for AFRICOM is not located on the African continent; rather, it is located in Stuttgart, Germany.[16]

Despite intentions, what exists is a focused attempt by two global superpowers to increasingly engage with the nations of this ancient continent, which remains largely underdeveloped. Objectively, China's long and consistent history of engagement with Africa has proven successful in forging economic[17] and legal relationships.[18] With the

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[10] Statement of General Carter Ham to the US House Armed Services Committee, AFRICOM.MIL (Feb. 29, 2012), http://www.africom.mil/fetchBinary.asp?pdfID=20120301102747 [hereinafter General Ham's Statement].

[11] *See* Francis, *supra* note 7, at 3.

[12] *See id.* at 5.

[13] *Id.* at 6.

[14] *Id.* at 4. "To be clear, AFRICOM's core objectives and mission statement are at the heart of critical challenges faced by post-Cold War Africa around the issues of peace, stability, security, development and governance."

[15] *See id.* at 16.

[16] *Id.* at 7. AFRICOM is co-located with United States European Command (EUCOM) in Stuttgart, Germany.

[17] *See also* Patrick J. Kennan, *Curse or Cure—China, Africa, and the Effects of Unconditional Wealth*, 27 BERKELEY J. INT'L L. 84, 85 (2009). Professor Kennan's article provides much insight into China's historic and increasing role in African economies. Excellent perspective is also provided on China's economic relationships with Angola, Sudan, Zambia, and Zimbabwe. This article expands upon Professor Keenan's work on labor and governance in Zambia and Zimbabwe by discussing various Sino-African legal issues in the domestic and international forums and comparing them to AFRICOM's strategic objectives of regional security and good governance in Africa.

[18] Hong Yonghong, *Trade, Investment and Legal Cooperation Between China and Africa*, *in* CHINESE AND AFRICAN PERSPECTIVES ON CHINA IN AFRICA 88 (Axel Harneit-Sievers et al. eds., 2010).

relatively recent establishment of AFRICOM, the United States appears to be racing to catch up. Sun Tzu famously wrote that "[g]enerally, he who occupies the field of battle first and awaits the enemy is at ease; he who comes later to the scene and rushes into the fight is weary."[19]

China's growing influence in Africa and its resulting effects on international law and domestic African legal systems is ultimately detrimental to AFRICOM's strategic objectives of promoting regional security and good governance on the continent. This article undergirds this assertion by first analyzing the effect of Chinese influence on international law in Africa by examining China's emerging role as a protectorate to African nations in which it has a vested economic interest, through its exercise of abstentions on the United Nations Security Council (UNSC).[20] Specifically, this article examines China's approach to the Darfur crisis in Sudan, along with China's abstention to UNSC Resolution 1973,[21] which directed a no-fly zone in Libya. Next, Chinese effects on domestic African legal systems are explored by examining China's increased engagement with African legal institutions through the Forums on China and Africa Cooperation (FOCAC), along with their influence on labor law and national governance in Zambia and Zimbabwe. Finally, the article contends that the aforementioned Chinese legal influences work against AFRICOM's strategic objectives of regional stability and good governance in Africa. Through this article, judge advocates practicing international and operational law in Asia and Africa will gain a better understanding of the legal effects of China's increasing role in Africa, and thus will more effectively advise commanders and conduct planning in these areas of operation.

II. Effects of China's Influence on International Law in Africa

I would go so far as to say that China has 'invented' non-participation [on the UNSC].[22]

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[19] SUN TZU, THE ART OF WAR 96 (Samuel B. Griffith trans., Oxford University Press 2d ed. 1971) (1963).
[20] U.N.Charter art. 23, para. 1.
[21] S.C. Res. 1973, U.N. Doc. S/RES/1973 (Mar. 17, 2011).
[22] SAMUEL S. KIM, CHINA, THE UNITED NATIONS, AND WORLD ORDER 290 (1979) (citing a UN envoy, "[n]ow it [the use of abstentions] is becoming a common practice not only in the [Security] Council but also in the [General] Assembly. Clearly, this is a major Chinese contribution to the voting procedures of the UN organs.").

The United Nations (UN) Charter does not give explicit authority for UNSC members to abstain from voting on resolutions, other than in Article 27, which allows for abstention only due to a conflict of interest.[23] In fact, commentary on the formation of the UN Charter suggests that the permanent members[24] of the UNSC would otherwise be required to affirmatively vote on all resolutions, unless they were a direct party to a conflict at issue.[25] The consistent and historical use of abstentions by China has developed into its own form of stare decisis in international law as applied to UNSC resolutions.[26] China has become the master of using abstentions, rather than vetoes, on the UNSC, especially on resolutions pertaining to the use of force.[27] Nowhere is this practice more evident in the realm of international law than in China's abstentions to UNSC resolutions as they apply to the nations of Africa.

> China does not want to use its veto power in this case for fear of rocking the boat. China's sole philosophy is self-interest, and it knows it can abstain, *counting on the fact that the resolution will still pass* and that whomever [sic] emerges from the power vacuum or seizes power in foreign countries will want strong relations with China.[28]

The remainder of this section examines the use of abstentions by China on the UNSC in conflicts arising in Sudan and Libya. It suggests that China's consistent use of abstentions is hindering the timely use of force by the UNSC in African nations where China has a vested

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[23] U.N. Charter art. 27, para. 3 ("[A] party to a dispute shall abstain from voting.").

[24] *Id.* art. 23, para 1. China, France, Russia, the United Kingdom, and the United States are the accepted permanent members of the UNSC. *See id*.

[25] *See* DAVID L. BOSCO, FIVE TO RULE THEM ALL, THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD 47 (2009).

[26] Yitzhak Schichor, *China's Voting Behavior in the UN Security Council*, THE JAMESTOWN FOUNDATION (May 9, 2007, 11: 03 AM), http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=3976/ ("Abstaining as a Strategy: Beijing's justifications for its occasional abstentions that raised eyebrows at the beginning have been remarkably consistent. They include draft resolutions perceived by Beijing as interfering in the domestic affairs of countries or undermining their sovereignty.").

[27] *Id.* ("Put differently, the Chinese advocated enforcement measures under Chapter VII of the UN Charter only when applied to colonial and apartheid questions. In those cases, Beijing was willing to call for arms embargoes and economic sanctions. Nonetheless, the Chinese have consistently opposed the use of force.").

[28] Alex Kravitz, *Five Abstentions: International Reluctance in Actually Desperate Situations*, BERKELEY POL. REV. (Mar. 18, 2011, 10:12 PM), http://bpr.berkeley.edu/2011/03/five-abstentions-international-reluctance-in-actually-desperate-situations/ (emphasis added).

economic interest, and that this effect on international law is to the detriment of African citizens.

A. Sudan

Then there's Sudan's Omar Hassan Ahmed al-Bashir. The international community accused him of genocide, but Beijing greeted him with open arms.[29]

Darfur is a region in western Sudan, an African nation lying along the Red Sea in northeast Africa.[30] Eighty separate ethnic groups compose the demographics of Darfur.[31] This diverse population of ethnicity generally falls within two larger groups; they are either nomadic Arabs or agricultural Africans.[32] Drought during the 1970s led to conflict between the Arabs and Africans in the Darfur region over sources of water.

The flashpoint in the conflict arose when Islamic sharia law was imposed over the entirety of Sudan by the central government in Khartoum, even over the non-Muslim Africans in Darfur.[33] In protest, the non-Muslim Africans formed an armed resistance called the Sudan People's Liberation Movement (SPLM), while the Muslim Arabs formed the Janjaweed militia.[34] What ultimately followed has been labeled by many as the genocide of Africans in Darfur at the hands of the Janjaweed.[35] Early in the crisis, international pressure began to mount on the UNSC to intervene. China would use its seat on the UNSC to thwart efforts at intervention under international law by the United Nations.

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[29] MICHEL & BEURET *supra* note 1, at 18. Beijing is the capital of China.
[30] *See* He Wenping, *The Darfur Issue: A New Test for China's Africa Policy*, *in* THE RISE OF CHINA AND INDIA IN AFRICA 156 (Fantu Cheru & Cyril Obi eds., 2010).
[31] *Id.*
[32] *Id.* The nomadic Arabs are located generally in northern Darfur, near the Sudanese border with Libya, while the agricultural Africans occupy central and south Darfur near the Sudanese border with Chad. *Id.*
[33] *Id.* Khartoum is the capitol of Sudan.
[34] *Id. See also* ALDEN, *supra* note 4, at 61–63.
[35] Wenping, *supra* note 30, at 156.

China's foreign policy is best described as "promoting China's economic development while maintaining political and social stability."[36] In a post-Cold War world characterized by regional conflict and globalization, this is a fine line for the Chinese to walk. Compare China's permanent position on the UNSC, which can authorize the use of force under international law, with its domestic "Five Principles of Peaceful Coexistence," which direct non-interference in foreign internal affairs,[37] and the dichotomy is evident.

In the midst of this incongruous foreign policy, China has aggressively pursued natural resources in Africa since the mid 1990s.[38] Before the Sudanese rich oil reserves were tapped, the Chinese initiated economic relations with Sudan through massive arms sales.[39] In the years leading up to the crisis in Darfur, China gulped eighty percent of Sudan's crude oil exports, while Chinese goods accounted for twenty percent of Sudan's economic imports.[40] As pressure mounted on the UNSC for action in Darfur, China found itself balancing three separate agendas: (1) the protection of its economic interests in Sudan; (2) its internal policy of non-interference with sovereign nations, and (3) its responsibility to enforce the peace as a permanent member of the UNSC.

Early in the crisis, the UNSC passed five significant resolutions addressing the situation in Darfur; China abstained from each vote.[41] China reached beyond mere abstention and used its position on the UNSC to weaken the resolutions that were passed.[42] Specifically, China vowed to veto any language threatening economic sanctions under Article 41,[43] likely fearing adverse economic effects on its own oil importations from Sudan.[44] In 2006, China abstained from UNSC Resolution 1706, which called for a deployment of UN peacekeepers to

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[36] IAN TAYLOR, CHINA'S NEW ROLE IN AFRICA 3 (2009).
[37] *Id.* at 14.
[38] ALDEN, *supra* note 4, at 3.
[39] Sharath Srinivasan, *A Marriage Less Convenient: China, Sudan and Darfur*, *in* CROUCHING TIGER, HIDDEN DRAGON? AFRICA IN CHINA 60 (Kweku Ampiah & Sanusha Naidu eds., 2008).
[40] *Id.*
[41] Schichor, *supra* note 26 (listing UNSC Resolutions 1556, 1564, 1591, 1593 and 1672).
[42] ANTHONY LAKE ET AL., MORE THAN HUMANITARIANISM: A STRATEGIC APPROACH TOWARD AFRICA 44 (2006).
[43] U.N. Charter art. 41. "These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication." *Id.*
[44] Srinivasan, *supra* note 39, at 67.

Darfur.[45] Sudan defiantly rejected the resolution (which passed notwithstanding China's abstention) and maintained that it would treat the presence of any UN peacekeeping mission as an invasion under the UN Charter.[46] The lack of unanimity by the permanent members of the UNSC (especially China) was viewed by many as the reason for Sudan's defiance to an otherwise legal and binding UNSC resolution.[47] China also abstained from UNSC Resolution 1593,[48] which referred the Darfur atrocity to the International Criminal Court for violations of human rights.[49]

Interestingly, China finally acquiesced to a peacekeeping mission in Darfur, but only after international threats of boycotting the 2008 Summer Olympics in Beijing, a boycott that would have had devastating effects on China's profit potential.[50] Tragically, the World Health Organization estimates that 70,000 Africans died during the crisis in Darfur.[51]

The prompt execution of international law was inhibited by China's use of the abstention on the UNSC, albeit not with the use of an actual veto as contemplated by Article 27 of the UN Charter.[52] This creates an alarming condition for Africans who might benefit from future UNSC resolutions.[53] China's regular abstentions as a permanent member of the

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[45] *Id.* at 70.
[46] *Id.*
[47] *Id.* "Khartoum's increasingly recalcitrant position and disregard for the international consensus that UN peacekeeping was required in Darfur led to fingers being pointed at the countries that had abstained from voting on Resolution 1706, above all China." *Id.*
[48] S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005). The United States also abstained.
[49] *See* Srinivasan, *supra* note 39, at 68.
[50] *See* MICHEL & BEURET *supra* note 1, at 156–57.
[51] Wenping, *supra* note 30, at 156.
[52] U.N. Charter art. 27, para. 3.
[53] *But see* S.C. Res. 2132, U.N. Doc. S/RES/2132 (Dec. 24, 2013). China voted for UNSC Resolutions 2132 as applied to stability in South Sudan. South Sudan's economy is based almost entirely (98%) on its oil reserves, and the pipeline for export run through Sudan. The majority of Sudan's oil exports go to China. The affirmative vote by China for this resolution can be distinguished from other abstentions as that unrest in South Sudan would have adverse effects on oil production. China takes 67% of South Sudan's oil exports; Yuwen Wu, *China's Oil Fears over South Sudan Fighting*, BBC NEWS AFRICA (Jan. 8, 2014, 11:02AM), http://www.bbc.com/news/world-africa-25654155; S.C. Res. 2149, U.N. Doc. S/RES/2149 (Apr. 10, 2014). China also voted for UNSC Resolution 2149 which focused on increased stabilty in the Central African Republic (CAR). Not surprisingly, China is CAR's second largest export partner, receiving 27.9% of CAR's commodity exports which include diamonds and timber; CIA WORLD

UNSC appear to water down any resolution passed in the eyes of the receiving party. Unfortunately, China's abstention in Sudan is only one example of a practice that spreads across the African continent.

B. Libya

We are coming tonight, and there will be no mercy.[54]

These dire words were spoken by Libyan leader Muammar Gaddafi to rebel forces in Libya. In response to the resulting violence, the UNSC passed Resolution 1973, which implemented a no-fly zone in Libya in an attempt to halt the airstrikes by the Gaddafi regime on Libyan civilian-rebels.[55] China, once again, abstained from this resolution.[56]

As in Sudan, China has vested economic interests in Libya,[57] a nation located in northern Africa, along the Mediterranean Sea. In 2011, after forty-one years under Gaddafi's rule, Libyan rebels formed an armed resistance to oust the controversial leader.[58] After a bloody conflict arose between government forces loyal to Gaddafi and the rebels, international pressure mounted on the UNSC to act decisively to end the violence.[59] China not only abstained from UNSC Resolution 1973, it also undermined the resolution's legitimacy by openly criticizing its passage in the international media.[60] Once again, China's economic

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FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ct.html (last visited June 2, 2014).

[54] Ishaan Tharoor, *Gaddafi Warns Benghazi Rebels: We Are Coming, And There'll Be No Mercy*, TIME (Mar. 17, 2011), http://world.time.com/2011/03/17/gaddafi-warns-benghazi-rebel-city-we-are-coming-and-therell-be-no-mercy/.

[55] S.C. Res. 1973, *supra* note 21.

[56] *UN Vote Approves Libya No-Fly Zone; China, Russia Abstain*, INT'L BUS. TIMES, Mar. 17, 2011, http://www.ibtimes.com/un-vote-approves-libya-no-fly-zone-china-russia-abstain-276107.

[57] Keith B. Richburg, *China, after Abstaining in U.N. Zote, Criticizes Airstrikes on Gaddafi Forces*, WASH. POST, Mar. 21, 2011, http://www.washingtonpost.com/world/china-after-abstaining-in-un-vote-criticizes-airstrikes-on-gaddafi-forces/2011/03/21/ABwL4M7_story.html. "Energy-hungry China imports about half of its oil from the Middle East and North Africa, with about three percent of that coming from Libya. Before the current unrest began, there were some 36,000 Chinese citizens in Libya working on about fifty projects. *Id.*

[58] Tharoor, *supra* note 54.

[59] *See id.*

[60] Richburg, *supra* note 57. "The military attacks on Libya are, following on from the Afghan and Iraq wars, the third time that some countries have launched armed action

motives ran afoul of its responsibilities on the UNSC to promote international law and order.

A pattern has emerged in international law through China's consistent application of abstentions on UNSC resolutions pertaining to Africa. Unfortunately, China's rising influence in Africa transcends effects on international law; it is affecting domestic African legal systems as well.

III. Effects of China's Influence in Africa on African Domestic Legal Systems

A long history of legal cooperation exists between China and the nations of Africa.[61] The FOCAC have created a new synergy around which China is increasing its influence in Africa. This section first broadly explains the intent behind the FOCACs, then describes the development of FOCACs, focusing solely on legal cooperation and engagement between China and the countries of Africa. Next, the legal pressure exerted by China into the domestic laws of African nations will be examined by discussing labor law and the influence on local governance in the developing nations of Zambia and Zimbabwe. China is increasing its influence in domestic legal systems in Africa, but not in a manner that is constructive for Africans.

A. Forums on China-Africa Cooperation

China catapulted a plan to increase engagement with Africa into action by planning and holding the first FOCAC[62] in Beijing in 2000.[63] To date, there have been five triennial FOCACs[64] that entail a series of conferences with key political leaders, businessmen, and lawyers from

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against sovereign countries," said a commentary in the Communist Party's main newspaper." *Id.*

[61] Yonghong, *supra* note 17, at 85. The legal ties between China and Africa began as early as 1874 in Ghana.

[62] ALDEN, *supra* note 4, at 2. Forum of China and Africa Cooperation (FOCACs) are also colloquially referred to as China-Africa Summits. *Id.*

[63] BROWN, *supra* note 2, at 34.

[64] *Id*. "The second, third, fourth, and fifth triennial FOCACs were held in 2003, 2006, 2009, and 2012 respectively, in Addis Ababa (Ethiopia), Beijing, Sharm El Sheikh (Egypt), and again in Beijing." *Id.*

China and African nations. The FOCACs are stylized by the Chinese government, and interpreted by some scholars as attempts to structure meaningful and mutual support between China and the nations of Africa.[65] Others believe that China is using its economic prowess to create unbalanced trade agreements in Africa that flood African economies with cheap goods, thereby increasing unemployment for local Africans, while bolstering profits for Chinese companies.[66]

The FOCACs have generated a number of sub-conferences, targeted at ways for China to organize and focus efforts at increasing its economic, political, and legal influence in Africa. Using the larger FOCACs as a method of establishing dialogue, the Chinese are pushing economic agendas forward through encouraging legal cooperation between China and many African states through FOCAC-Legal Forums.

FOCAC-Legal Forums

The FOCAC-Legal Forums are specifically designed to increase Chinese and African legal cooperation.[67] To date, there have been two FOCAC-Legal Forums. The first was held in Cairo, Egypt, in December 2009.[68] The forum brought together over eighty lawyers, judges and government officials from China and twenty African countries.[69] The first FOCAC-Legal Forum focused on four themes: (1) the role of law in China-Africa engagement; (2) the introduction of legal systems; (3) the effects of legal systems on Chinese-African economic relations; and (4) methods for economic dispute resolutions between China and African countries.[70] These seemingly benign areas of legal focus are indicative of China's attempt at shaping the legal battlefield in Africa toward domestic legal systems that are ultimately more advantageous to China's

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[65] BRAUTIGAM, *supra* note 6, at 241. The author believes Chinese projects stemming from the FOCACs "married aid to China's global business ambitions." *Id.*

[66] *See* Lloyd Sachikonye, *Crouching Tiger, Hidden Agenda? Zimbabwe—China Relations*, *in* CROUCHING TIGER, HIDDEN DRAGON? AFRICA IN CHINA, *supra* note 38, at 124–37.

[67] *The First "Forum on China-Africa Cooperation- Legal Forum*, FORUM ON CHINA-AFRICA COOPERATION (Dec. 4, 2012, 6:04 PM), http://www.focac.org/eng/dsjbzjhy/hxxd/t648400.htm [hereinafter *First FOCAC*].

[68] *Id.*

[69] *The Invitation Letter of the Second "Forum on China-Africa Cooperation- Legal Forum*, FORUM ON CHINA-AFRICA COOPERATION (Dec. 4, 2012, 6:11 PM) http://www.focac.org/eng/dsjbzjhy/hxxd/t695254.htm.

[70] *First FOCAC*, *supra* note 67.

economic interests.

The Second FOCAC-Legal Forum was held in Beijing in September 2010.[71] Carrying a theme translated as "grasp the opportunities, strengthen the legal cooperation, and push forward the overall development of the Chinese-Africa new-type [sic] strategic partnership,"[72] the conference pushed the envelope on Sino-African legal cooperation. The scope of this conference also appears to exceed that of the first, suggesting a trend toward increasing legal cooperation between African states and China. Topics of this forum included: (1) the effects of China-African cooperation on emerging international law; (2) the rule of law in China and African countries; (3) laws affecting China-Africa economic collaboration; and (4) judicial cooperation in criminal cases about foreign employment and labor.[73]

Some Africans have embraced the energized effort at legal partnership with China and encouraged future cooperation.[74] Regardless of the praise received by the Chinese by some Africans, it is clear that others are viewing Chinese engagement with domestic legal systems with increasing disdain and skepticism, as seen in Zambia and Zimbabwe.

B. Zambia

Zambia is becoming a province, make that a district of China.[75]

Zambia is a land-locked nation in south-central Africa. Sino-Zambian engagement began in the 1960s as Chinese-backed liberation groups struggled for control of the nation from Great Britain.[76] After the liberation groups gained control of Zambia, China backed a project to

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[71] *The Second FOCAC-Legal Forum Concluding Report*, FORUM ON CHINA-AFRICA COOPERATION (Dec. 5, 2012, 3:11 PM), http://www.focac.org/eng/zxxx/t765099.htm.
[72] *Id.*
[73] *Id.*
[74] *Id.* Mr. Djaffar Mohamed Ahmed Mansoib, minister of Justice of Comoros, "confirmed the positive role of China played in aiding to Africa, and suggested that [in] the process of searching for peace, safety and development, Africa should regard the legal cooperation [with China] as a core action."
[75] MICHEL & BEURET *supra* note 1, at 233 (emphasis added). Quote by Zambian Presidential opposition leader, Michael Sata.
[76] Muna Ndulo, *Chinese Investments in Africa: A Case Study of Zambia*, *in* CROUCHING TIGER, HIDDEN DRAGON? AFRICA IN CHINA , *supra* note 38, at 139.

build the Tam-Zam railway to the African nation of Tanzania, located along the Indian Ocean.[77] The railway would facilitate trade and commerce for a nation that was struggling economically and had no access to the sea to foster trade.[78] Since the 1970s, China has worked to solidify its partnership with Zambia. That relationship flourished in the 1990s when China began investing in the mining industry in Chambishi.[79] Chambishi is located in the heart of Zambia's Copper Belt, a region characterized by rich deposits of copper ore.[80] But as Chinese investments in the Chambishi region grew, so did the grievances from Zambian workers who faced increasingly dangerous labor conditions from Chinese companies that failed to adhere to Zambian labor laws.

1. Zambian Labor Law and Chinese Industry

One Human Rights Watch report from 2011 quotes an African worker as saying, "Sometimes when you find yourself in a dangerous position, they tell you to go ahead with the work. They [Chinese management] just consider production, not safety. If someone dies, he can be replaced tomorrow. And if you report the problem, you lose your job."[81] Zambian labor laws are objectively admirable; the problem lies in compliance by Chinese industry and enforcement by a government increasingly deferential to Beijing's bidding.[82] The Minimum Wages and Conditions of Employment Act[83] along with the Mines and Mineral Act[84] are Zambian laws that provide baseline protection for the health and welfare of mine workers. Chinese companies have not consistently followed these laws, and the Zambian government has not enforced their compliance. In April 2005, a Chinese-operated plant in the Chambishi

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[77] *See* MICHEL & BEURET *supra* note 1, at 234.
[78] *Id.*
[79] Kennan, *supra* note 17, at 84.
[80] Martyn J. Davies, *Special Economic Zones: China's Developmental Model Comes to Africa*, *in* CHINA INTO AFRICA, TRADE AID, AND INFLUENCE 143, 144 (Robert I. Rotberg ed., 2008).
[81] *Zambia: Workers Detail Abuse in Chine-Owned Mines*, HUM. RTS. WATCH (Nov. 3, 2011), http://www.hrw.org/fr/node/102667.
[82] *See* MICHEL & BEURET *supra* note 1, at 11. "The Zambian government, like its police force, has given its full support to the Chinese and their business interests, even as its people's hostility increases." *Id*.
[83] Minimum Wages and Conditions of Employment Act, Cap. 276, 15 LAWS OF REP. OF ZAMBIA (2012).
[84] Mines and Mineral Act, Cap. 213, 31 LAWS OF REP. OF ZAMBIA (1995).

region exploded and killed fifty-two Zambian laborers.[85] Two months later, a Chinese manager shot five workers who were protesting their wages.[86] These events exposed the unsafe labor practices in Zambia at the hands of Chinese employers and would unite rising discontent by Zambian laborers.

China's thirst for resources is affecting Zambian law through its non-enforcement by Zambian government officials desiring to placate Chinese business interests. Human rights scholars note that "the treatment of workers of one Chinese-run copper mining operation in Zambia, where unsafe and inhumane working conditions have been reported, is better framed as the non-application of domestic labor laws."[87]

As anti-Chinese sentiment grew in Zambia in response to labor conditions in 2005, so did the message of Michael Sata, the opponent to incumbent Zambian President Levy Mwanawasa. With millions of dollars invested in Zambia, would the Chinese remain quietly on the sidelines and continue their self-professed laissez faire[88] approach to governance for the 2006 election?

2. Bolstering Levy Mwanawasa

In the wake of the deaths at Chambishi, Michael Sata[89] ran against incumbent President Levy Mwanawasa on an anti-Chinese platform and a "failure of the Mwanawasa government to uphold either Zambian law or the interests of the people."[90] President Levy Mwanawasa ran on a pro-Chinese platform, ultimately chastising Zambians for being critical

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[85] MICHEL & BEURET, *supra* note 1, at 236–37. The Bgrimm Explosives Plant only paid $9,750 to the family of each dead worker. *Id.* at 237.

[86] ALDEN, *supra* note 4, at 74.

[87] Stephen Brown & Chandra Sriram, *China's Role in Human Rights Abuses in Africa: Claryifying Issues of Culpability*, *in* CHINA INTO AFRICA, TRADE AID, AND INFLUENCE 252 (Robert I. Rotberg ed., 2008).

[88] ALDEN, *supra* note 4, at 14. The Chinese Five Principles of Peaceful Coexistance direct non-interference in foreign internal affairs, yet it appears that China is working to affect legal and political systems within Zambia and Zimbabwe.

[89] *See Michael Sata: Zambia's 'King Cobra' Finally Strikes*, BBC NEWS AFRICA (Sept. 23, 2011, 8:24AM), http://www.bbc.co.uk/news/world-africa-15034694. Michael Sata eventually won election to the Zambian Presidency in 2011on his fourth attempt. *Id.*

[90] ALDEN, *supra* note 4, at 74.

of the Chinese, given their immense investments in Zambia.[91] China, in defiance of its self-purported position on non-engagement with local governance,[92] threatened to withhold further development aid until the outcome of the election.[93] Allegations of interference by the Chinese government in the election are prevalent.[94] The Chinese-backed incumbent Levy Mwanawasa won the 2006 Zambian presidential election with only forty-three percent of the vote,[95] even though polls suggested that opposition leader Michael Sata was leading the race.[96] Unfortunately, Chinese interference with labor law and local governance is not an isolated incident in Africa, as seen in Zambia's neighbor to the south, Zimbabwe.

C. Zimbabwe

> *We have turned east where the sun rises, and given our backs to the west, where the sun sets.*[97]

Zimbabwe, like Zambia, is a landlocked nation in southern Africa with a turbulent political history. Formerly known as Rhodesia, the Chinese began backing the liberation efforts of the Zimbabwe African National Union Patriotic Front (ZANU-PF) in the 1960s.[98] After a

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[91] BRAUTIGAM, *supra* note 6, at 6. "Zambian President Levy Mwanawasa countered: 'the Chinese government has brought a lot of development to this country and these are the people you are demonstrating against?'" *Id.*

[92] TAYLOR, *supra* note 36, at 14. Discussing China's Five Principles of Peaceful Coexistence, which includes noninterference in internal affairs. *Id.*

[93] Kennan, *supra* note 17, at 104.

[94] Howard French, *In Africa, an Election Reveals Skepticism of Chinese Involvement*, THE ATLANTIC (Sept. 29, 2011, 7: 00 AM), http://www.theatlantic.com/international/archive/2011/09/in-africa-an-election-reveals-skepticism-of-chinese-involvement/245832/.

[95] *The Impact of the Chinese Presence in Africa*, AFRICA PRACTICE (Apr. 26, 2007), http://www.davidandassociates.co.uk/davidandblog/newwork/China_in_Africa_5.pdf.

[96] *Id.* at 19.

[97] John B. Karumbidza, *Win-Win Economic Cooperation: Can China Save Zimbabwe's Economy?*, *in* AFRICAN PERSPECTIVES ON CHINA IN AFRICA 87 (Firoze Manji & Stephen Marks eds., 2007). President Robert Mugabe's remark in May 2005, on the 25th anniversary of Zimbabwean independence. He suggests that Zimbabwe plans to primarily engage with China, rather than the United States on all future matters of state. *Id.*

[98] Sachikonye, *supra* note 66, at 124–26. Two liberation groups emerged during this period in Zimbabwe. The ZANU-PF and the Zimbabwe African People's Union (ZAPU). The Soviet Union backed the ZAPU. The ZANU-PF emerged as the dominant

protracted war that persisted throughout the 1970s against the mostly white Rhodesian government, the ZANU-PF emerged victorious and became the dominant political party in Zimbabwe in 1980.[99] Robert Mugabe was ultimately elected as president.[100] Under Mugabe's iron rule, Zimbabwe has spiraled into a nation characterized by authoritarianism and isolation,[101] while China has emerged as Zimbabwe's second-largest economic partner.[102] This section explores the non-adherence of Zimbabwean labor law by Chinese industry, and details China's support of Robert Mugabe to ultimately maintain an economic status quo to buttress China's economic interests in Zimbabwe.

1. Zimbabwean Labor Law and Chinese Industry

China has emerged as Zimbabwe's second-largest trading partner, but there is unease among Africans about the mutual benefits of this economic relationship.[103] The thrust of Chinese economic interest in Zimbabwe centers on natural resources, and their efficient removal from the country.[104] China is the world's largest producer and consumer of steel; and Chinese mining in Zimbabwe is thriving.[105] Local infrastructure development by Chinese companies also abounds in Zimbabwe.[106] At first glance, this robust economic investment by the Chinese into a landlocked, developing nation in south-central Africa would appear to be a good thing for the Zimbabwean economy, and ultimately benefit the Zimbabwean laborer. However, African leaders and many scholars are concerned about the influx of cheaper Chinese goods that have forced local businesses to close, and the abuse of laborers at the hands of Chinese employers is on the rise.[107]

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political party in 1980, although the ZAPU was invited to participate in the new government as a minority party. *Id.*

[99] Brown & Sriram, *supra* note 87, at 260.

[100] *Id.*

[101] Sachikonye, *supra* note 66, at 126.

[102] *Id.* at 127.

[103] *Id.*

[104] *Id.* "Chinese investments have largely been concentrated in extractive sectors, such as mining, infrastructure and utilities." *Id.*

[105] *Id.* at 128.

[106] *Id.* at 129–30. The Chinese have resourced railway, communications, and utilities in Zimbabwe.

[107] Karumbidza, *supra* note 97, at 101.

The Zimbabwe Labour Relations Act[108] provides baseline protections for Zimbabwean laborers. In addition to ensuring safety in the workplace, the Labour Relations Act also allows for trade unions to form to promote workers' rights.[109] Unfortunately, Mugabe's regime seems more concerned about fostering economic development and harmony with its deep-pocketed Chinese ally than protecting its citizens from unfair labor practice.[110]

An illustrative example of this idea is found in the construction of Zimbabwe's National Defense College. This college was built by Chinese firms at a cost of $98 million.[111] The debt is to be repaid by allowing the Chinese to extract diamonds from the Marange diamond fields over the next thirteen years.[112] Zimbabwean laborers employed by the Chinese for this construction and other projects across Zimbabwe are habitually underpaid, over-worked, denied proper safety equipment, and summarily fired upon completion of the project.[113] Nevertheless, "Chinese companies seem to have a kind of diplomatic protection from the government that allows them to violate any labour law."[114] The Labour Court in Zimbabwe is overwhelmed with complaints by laborers against foreign companies.[115] The Chinese have not only defied local labor law, they have worked to foster its non-enforcement through bolstering the regime of its most vocal supporter, Robert Mugabe, the President of Zimbabwe.

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[108] Zimbabwe Labour Relations Act (Acts No. 16 of 1985 as amended through Act No. 20 of 1994) (Chap. 28:01) (Zimb.).

[109] *Id.*

[110] *See* Karumbidza, *supra* note 97, at 92. The author describes Mugabe as viewing "democracy and development as mutually exclusive." *Id.*

[111] *Chinese Companies Free to Exploit Workers in Zimbabwe*, EQUAL TIMES (Sept. 22, 2012), http://www.equaltimes.org/in-depth/chinese-companies-free-to-exploit-workers-in-zimbabwe-2 [hereinafter *Chinese Exploit Workers*].

[112] *Id.* Interestingly, the Chinese have not paid any tax to the Zimbabwean treasury for its production in Marange, an area in Zambia characterized for its diamond resources. *See id.*

[113] *Id.*

[114] *Id.*

[115] Lincoln Towindo. *Zimbabwean Workers, Foreign Employers in Labour* Wars, SUNDAY MAIL (Apr. 7, 2012, 4:29 PM), http://www.sundaymail.co. zw/index.php?option =com_content&view=article&id=28007.

2. Bolstering Robert Mugabe

The Chinese have backed the ZANU-PF, Robert Mugabe's political party, for decades.[116] Again, one can see empirical evidence that suggests China has jettisoned its purported position of non-interference with foreign state affairs in exchange for economic gain, and furthered the political status quo in Zimbabwe through supporting Mugabe's regime.[117] "Without China, there is almost no way that Zimbabwe's president [Robert Mugabe] could have remained in power."[118] In addition, Mugabe's pragmatic approach to economics sits well with the Chinese model of placing national fiscal concerns above all others.[119]

China's support of Mugabe has not collectively benefited the citizens of Zimbabwe.[120] In fact, such support runs afoul of promoting normative models of good local governance. A troubling example of a quid pro quo relationship has developed between Mugabe and the Chinese. In exchange for political support, Mugabe has used anti-Western rhetoric to give the Chinese an ever-growing share hold in the Zimbabwean economy.[121] Such share holds include national railways and airlines, electrical supply, and communications.[122]

Thus, China's rising influence in Africa is affecting international law and domestic African legal systems. The final section of this article compares these legal effects with AFRICOM's strategic objectives of regional security and good local governance, and concludes that China's legal influence in Africa is ultimately antagonistic for AFRICOM.

IV. Legal Effects of Chinese Influence in Africa on AFRICOM's Strategic Objectives

[T]he events of 9/11, combined with 20/20 hindsight, made clear that

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[116] IAN TAYLOR, CHINA AND AFRICA, ENGAGEMENT AND COMPROMISE 106–07 (2006).
[117] Karumbidza, *supra* note 97, at 99. "The current arrangements simply allow Mugabe to keep the illusion of victory over the West and enable his cronies in the army, police, government and business to partner with the Chinese in further exploitation of the masses." *Id.*
[118] Kennan, *supra* note 17, at 104.
[119] TAYLOR, *supra* note 116, at 118.
[120] Karumbidza, *supra* note 97, at 95.
[121] *Id.*
[122] *Id.*

Africa was integral, not peripheral, to global security in general, and U.S. security interests in particular, in the post 9/11 world.[123]

In addition to U.S. security interests, Africa might be emerging as a new battleground as the United States conducts its "pivot to the Pacific" to counter rising superpowers like China.[124] The U.S. National Security Strategies and budgets of the Bush[125] and Obama[126] presidencies have placed emphasis on the need for increased engagement with Africa.

A. AFRICOM's Strategic Objectives

The strategic objectives of AFRICOM in Africa include promoting U.S. national security interests through regional security in Africa by fostering an environment conducive to good governance and development.[127] AFRICOM's utility in furthering these objectives has already borne fruit. In 2010, AFRICOM's Office of Legal Counsel successfully orchestrated its first of two African Military Legal Conferences,[128] focusing on increased collaboration and training with U.S. judge advocates, their respective African military-legal counterparts, and international legal experts.[129] These conferences concentrated on promoting the rule of law, military justice, and maritime law.[130]

In 2011, *Operation Odyssey Dawn*, the U.S. involvement in the enforcement of the no-fly zone in Libya following UNSC Resolution

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[123] Theresa Whelan, *Africa: A New Strategic Perspective*, *in* US STRATEGY IN AFRICA: AFRICOM, TERRORISM, AND SECURITY CHALLENGES 36 (David J. Francis ed. 2010).

[124] *See* Rosa Brooks, *The Pivot to Africa; Circumcision. Mosquito Killing, and Other Strange Doings of AFRICOM*, FOREIGN POL'Y (Aug. 16, 2012), http://www.foreighn policy.com/articles/2012/08/16/the_pivot_to_africa?page=0,3.

[125] *Id.*

[126] Daniel Volman, *AFRICOM: What Is It for and What Will it Do?*, *in* US STRATEGY IN AFRICA: AFRICOM, TERRORISM, AND SECURITY CHALLENGES 59 (David J. Francis ed., 2010).

[127] General Ham's Statement, *supra* note 10.

[128] Nicole Dalrymple, *AFRICOM Hosts First Africa Military Legal Conference, Nearly Fifteen African Nations Participate*, AFRICOM.MIL (May 19, 2010), http://www.afri com.mil/NEWSROOM/Article/7408/africom-hosts-first-africa-military-legal-conferen.

[129] Danielle Skinner, *African Legal Experts from 20 Nations Collaborate on Maritime Law Initiatives*, AFRICOM.MIL (May 3, 2011), http://www.africom.mil/NEWSROOM/ Article/8275/african-legal-experts-from-20-nations-collaborate-.

[130] *Id.* Maritime law has become an increasingly important legal issue as piracy plagues the waters off the Horn of Africa.

1973, was effectively coordinated by AFRICOM.[131] This was the first large-scale military operation for AFRICOM.[132] Operations like these support AFRICOM's objective of ensuring regional stability in Africa. But in the midst of these efforts to foster the rule of law and promote regional security, China's ever-growing influence in Africa has worked against AFRICOM's strategic objectives.

B. China's Influence on International Law Versus African Regional Security

Perhaps most disturbing to U.S. political objectives is China's willingness to use its seat on the UN Security Council to protect some of Africa's most egregious regimes from international sanction, in particular Sudan and Zimbabwe.[133]

Looking to the future, it is likely that AFRICOM's enforcement of regional security in Africa will be endorsed by UNSC resolutions authorizing the use of force under the UN Charter. Such an authorization occurred in 2011 through UNSC Resolution 1973 for the no-fly zone in Libya. Consequently, continued attempts by China to thwart UNSC resolutions in Africa, as discussed above, are antagonistic to AFRICOM's strategic objectives of regional security.

China's consistent use of abstentions on the UNSC, especially on matters pertaining to African nations with significant Chinese economic investment, ultimately works against AFRICOM's strategic objective of regional security in two ways. First, the lack of unanimity by the permanent members of the UNSC can be viewed by those at the spearhead of UNSC resolutions as watered-down and impotent,[134] which reduces the legitimacy of these otherwise binding international legal actions. Second, China's informal efforts[135] on the UNSC to weaken resolutions applying to African nations described above delay economic and military action that could work to stop violence and save lives in

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[131] Brooks, *supra* note 124.
[132] *Id.*
[133] LAKE ET AL., *supra* note 42, at 41.
[134] *See* Srinivasan, *supra* note 39, at 67 ("Wielding its veto card, Beijing had succeeded in ensuring that the threat of oil trading sanctions against Khartoum was significantly weakened.").
[135] LAKE ET AL., *supra* note 42, at 44. China vowed to veto any efforts under Article 41 against Darfur in Sudan fearing adverse effects on oil production in the region.

Africa.[136]

C. China's Influence on African Domestic Law Versus Good Governance

Promoting good local governance in Africa is a "core objective"[137] for AFRICOM. Sino-influence in the arenas of domestic legal affairs, including the non-compliance of domestic African labor law and the support of political leadership in African nations for the sole purpose of maintaining and promoting economic relationships, is not conducive to good local governance, or the rule of law in Africa.

As a global superpower with the world's second-largest economy,[138] China must be cognizant of the secondary and tertiary effects of its support of political candidates on the local population. Such decisions should transcend Chinese economic interests.[139] This becomes increasingly important as China has established the developing world as a priority in its foreign policy,[140] where legal systems based on the rule of law are not fully developed and elections can have far-reaching effects on the welfare of local Africans, along with the development and enforcement of laws to protect them. As AFRICOM's objectives continue to focus on good local governance in African nations to promote democracy and security, China's actions appear to directly countermand the goals of AFRICOM by valuing economic factors above the interests of African citizens. The result appears to be corrupt

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[136] *See* JAMES E. BAKER, IN THE COMMON DEFENSE, NATIONAL SECURITY LAW FOR PERILOUS TIMES 63–69 (2007). In the area of national security law, the informal processes, rather than the formal processes, more often affect outcomes and legislation. *See id*.

[137] Francis, *supra* note 7, at 4.

[138] DAMBISA MOYO, WINNER TAKE ALL: CHINA'S RACE FOR RESOURCES AND WHAT IT MEANS FOR THE WORLD 17–18 (2012).

[139] Perhaps all nations of the UNSC should be obligated to set aside interests that are focused solely on internal economic growth and consider the impact of their decisions on local governance, regional security, and the larger promotion of global adherence to the rule of law when voting. U.N. Charter article 27, paragraph 3 states that "[A] party to a dispute shall abstain from voting." UN Charter art. 27, para. 3. This provision envisions armed conflict, rather than abstention as a politically move to protect internal economic interests. As a member of the UNSC, China must lead in an altruistic manner that prioritizes the development of good local governance, regional security, and adherence to the rule of law over its own economic growth and development. The United States should not be excluded from this obligation.

[140] TAYLOR, *supra* note 36, at 14.

governments not focused on the welfare of its citizens, but rather on financial aid and economic deals from China that often run counter to enforcing the rule of law or human rights.[141]

V. Conclusion

> *Offensive Strategy. Next best is to disrupt his* [the enemy's] *alliances . . . and cause them to be severed and dissolved . . . if he has no alliances . . . his position is weak.*[142]

China's rising legal influence in Africa, through international law in the UNSC and on African domestic legal systems, ultimately works against AFRICOM's strategic objectives of regional security and good local governance. China accomplishes this by minimizing and undermining U.S. influence with African states that increasingly engage with China on economic and legal issues. As Africa emerges as a front in the war on terrorism[143] and a potential future battleground for allies and resources between the United States and China, the early emergence of Sino-African cooperation in international law and in African domestic legal systems does not promote U.S. security interests in AFRICOM.

Although AFRICOM's Office of Legal Counsel is developing excellent relationships with legal experts in Africa,[144] the U.S. Department of State should conduct a more focused, FOCAC-type approach to domestic legal engagement with African nations. Such legal engagement would work to further good governance, regional security, and the rule of law while ultimately building alliances and providing developing countries in Africa with an alternative to China. Judge advocates should consider the broader international and domestic legal effects of China's role in Africa when advising commanders and planning operations in the AFRICOM area of responsibility.

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[141] *See generally* BRAUTIGAM, *supra* note 6, at 135.
[142] SUN TZU, *supra* note 19, at 78.
[143] Adam Entous & Siobhan Gorman, *U.S. to Expand Role in Africa, Military Pact with Niger for Intelligence Base Brings America Closer to* Conflict, WALL ST. J., Jan. 29, 2013, at A1. The United States reached an agreement with Niger to support the French war against al Qaeda in Mali. *Id.*
[144] Skinner, *supra* note 129.

As the U.S. Department of Defense conducts its "pivot to the Pacific,"[145] only time will tell if China's early and growing efforts at protecting its interests in Africa through its position on the UNSC and by influencing domestic legal systems will prove to be a decisive move in an intercontinental chess game involving strategic alliances and resource development. To counter Sun Tzu's quote in the introduction of this article, arriving late to a fight may put the United States at a disadvantage to China in African engagement, but it is not dispositive of ultimate defeat. As such, the United States must prioritize and amplify its efforts at legal engagement and cooperation with African states, not only for promoting regional security and good local governance in Africa, but also for furthering the national security interests of the United States.

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[145] Max Boot, *America's 'Pacific Pivot' Craze*, LOS ANGELES TIMES, Jul. 2, 2012, http://articles.latimes.com/2012/jul/02/opinion/la-oe-boot-defense-pacific-pivot-20120702. If the pivot of U.S. forces to the Pacific is in response to a perceived threat from states like China, then working to establish and cement allies within the continent of Africa would have the benefit of promoting regional security and good local governance in Africa, while providing African states an alternative economic trade partner to China.

LAW-OF-WAR PERFIDY

SEAN WATTS*

Perfidy and treachery are among the gravest law-of-war violations. The betrayals of good faith associated with perfidy threaten more than the immediate, tactical positions of the attacker and victim. Perfidious betrayals inflict systemic harm on the law of war as a guarantee of minimally humane interaction. Even a single instance of perfidy can permanently compromise the possibility of humanitarian exchange between belligerents.

The remedies for perfidy reinforce the point. In personal, professional, and international relations, perfidy and treachery provoke draconian and irreversible reactions. Early professional military codes prescribed summary death for treacherous correspondence with enemies.[1] Earlier, medieval notions of honor and chivalry sanctioned unending blood feuds to avenge knights killed by treachery.[2] Thomas Jefferson, the acknowledged author of the American Declaration of Independence, cited English perfidy among the grievances justifying full-scale revolt, violent war, and permanent succession from the British monarchy.[3]

Admittedly, many historical uses of the term have been political rather than legal. Yet perfidy and treachery[4] were still well established

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[1] American Articles of War of 1775, Additional Articles, art. 1 (Nov. 7, 1775); Massachusetts Articles of War, art. 27 (Apr. 5, 1775); British Articles of War of 1765 § XIV, art. XIX; Articles of War of James II, art. VIII (1688).

[2] Geoffrey Parker, *Early Modern Europe*, *in* THE LAWS OF WAR 54 (Michael Howard, George J. Andreopoulos & Mark Shulman eds., 1994) [hereinafter Howard et al.]

[3] Declaration of Independence (1776), *available at* http://avalon.law.yale.edu/18th_century/declare.asp. Jefferson and his co-signers' allegation of perfidy referred specifically to the conduct of mercenaries employed by the English. *Id.* The Declaration of Independence includes several references to the law of war of the period. *Id.*; *see also* JOHN FABIAN, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 15–27 (2012).

[4] Law-of-war commentators have intermittently regarded perfidy and treachery as synonymous. Lieutenant Colonel Willard B. Cowles, *High Government Officials as War Criminals*, 39 AM. SOC. INT'L L. PROC. 54, 58 (1945) (asserting "The words 'treachery'

legal concepts in the early customs and usages of war.[5] Originally grounded in broad, customary notions of chivalry and honorable combat, the prohibition of perfidy proved an essential aspect of ordered hostilities. The prohibition of perfidy became much more than a general sanction of underhanded or dishonorable conduct. Law prohibiting perfidy proved an essential buttress to the law of war as a medium of exchange between combatants—a pledge of minimum respect and trust between belligerents even in the turmoil of war. Indeed, it may be difficult to conceive of an operative or effective war convention at all without effective rules against perfidy.

Despite its critical role in sustaining belligerents' faith in the law of war, the current legal formula for perfidy shows signs of weakness. Amid seismic shifts in the conduct, scale, participants, and means of warfare, States have codified progressively narrower conceptions of perfidy, ultimately incorporating discrete and narrow legal elements into the offense. Once a broadly expressed and widely understood principle for instructing combatants in honorable warfare, the perfidy prohibition now appears as a narrowly codified legal algorithm better suited to legal advisors and tribunals than to combatants. As evidence of this trend, this article identifies and explains three categories of perfidy: simple perfidy;

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and 'perfidy' are essentially synonymous."). *See also* discussion *infra* and accompanying notes 127–33.

[5] CORNELIUS VAN BYNKERSHOEK, A TREATISE ON THE LAW OF WAR 3 (The Law Book Exchange, Ltd. 2008) (1737). Van Bynkershoek's treatise, originally published in Latin, is thought to have been especially influential in the American Revolution. *Id.* at v. Although associated with an exceptionally permissive view of lawful conduct in combat, Van Bynkershoek specifically disapproved of perfidy. *Id.* He observed,

> Nor ought *fraud* to be omitted in a definition of war, as it is perfectly indifferent whether stratagem or open force be used against an enemy. There is, I know, a great diversity of opinion upon this subject: *Grotius* quotes a variety of authorities on both sides of the question. For my part, I think that every species of deceit is lawful, perfidy only excepted; not that any thing may not lawfully by done against an enemy, but because, when a promise has been made to him, both parties are devested of the hostile character as far as regards that promise.

Id. at 3 (emphasis in original) (citation omitted); *see also* 2 ALBERICO GENTILI, DEIURE BELLI LIBRI TRES 175 (James Scott ed., John C. Rolfe trans., 1933) (1612) (It.) (noting military leaders were permitted to counter treachery with treachery); PIERINO BELLI, A TREATISE ON MILITARY MATTERS AND WARFARE 88 (James Brown Scott ed., Herbert C. Nutting, trans., 1936) (1563) (It.) (noting "faith must be kept with an enemy" and "deceptions that involve no treachery are allowable").

prohibited perfidy, and grave perfidy. More than doctrinal monikers, these categories reveal that the twentieth century's codification of the perfidy prohibition converted a popularly and intuitively understood label for betrayal of trust or confidence into a technically bound term of art, comparatively divested of much of its customary import and broad coverage.

While current expressions of perfidy perhaps facilitate criminal enforcement in courtrooms, much of the spirit and purpose of the customary prohibition appears to have been lost. Overall, the price of doctrinal clarity has been reduced attention and fidelity to good faith conduct of hostilities critical to humane combat and to sustaining the law-of-war as a trusted means of communication and interaction between belligerents. This article argues that through doctrinal narrowing States have created a perfidy prohibition inadequate to protect the law of war as a means of good faith and humanitarian exchange between combatants. An understanding of perfidy that is at once consistent with principled understandings of the law, protective of minimal concerns of humanity, and all the while preserves something of the law of war as a system of minimum good faith between adversaries is highly elusive. Giving effect to States' twentieth-century narrowing of the perfidy prohibition leaves critical, widely-accepted values of the law of war unvindicated. Only State consensus on a broader conception of prohibited perfidy and treachery will prevent erosion of enduring law-of war values and the law of war itself.

To be certain, twentieth-century codifications and refinements of the law of war have loaned clarity and, by implication, legal legitimacy to conventions thought to have approached "the vanishing point" of law.[6] But whether migration from broad principles to specific prohibitions to regulate warfare has produced an optimal result is uncertain. This article's consideration of law-of-war perfidy will perhaps also serve a starting point for a more deliberate consideration these competing methods of international law making and development.

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[6] Lauterpacht famously employed the phrase, "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT'L L. 360, 382 (1952).

I. Perfidy in Modern Armed Conflict

Despite revolutionary changes in the means and methods of warfare, perfidy persists in modern armed conflict. Respect for the law-of-war perfidy prohibition remains a crucial legal and even mass-market bellwether for honorable and privileged conduct by belligerents.[7] Perfidy prohibitions feature consistently in the subject matter jurisdiction of criminal tribunals, international and domestic.[8] Meanwhile, twenty-first century conflicts, pitting culturally, professionally, and even morally asymmetrical foes, have seen a rise in perfidious conduct. A brief account of instances of perfidy on the modern battlefield and pending enforcement efforts highlights the need for a more clearly and completely conceived notion of prohibited perfidy.

A. Perfidy in Action

A U.S. Department of Defense report to Congress observed that instances of perfidy in the 1991 Persian Gulf War were rare.[9] However,

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[7] Neal A. Richardson & Spencer J. Crona, *Make Iraqis Pay for Acts of 'Perfidy,'* L.A. TIMES, Apr. 8, 2003, http://articles.latimes.com/2003/apr/08/news/war-oerichardson8 (arguing that insurgent law-of-war violations, particularly perfidy, have received inadequate prosecutorial attention).

[8] Statute of the International Criminal Court, arts. 8.2(b)(xi), 8.2(e)(ix), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Rome Statute] (identifying respectively "killing or wounding treacherously individuals belonging to the hostile nation or army" and "killing or wounding treacherously a combatant adversary" as war crimes within the ICC's jurisdiction). The U.S. Military Commissions Act of 2009 includes "Using Treachery of Perfidy" among offenses chargeable against alien unlawful combatants at military commissions. 10 U.S.C. § 950t(17) (2013).

[9] U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR: FINAL REPORT TO CONGRESS app. O, at O-21 (1992), *available at* http://www.dod.mil/pubs/foi/operation_operation _and_plans/PersianGulfWar/404.
pdf. The report cites two examples in its discussion of perfidy. It first notes an incident that popular accounts had misidentified as perfidious:

> Iraqi tanks entered Ras AI-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender per se. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.

since that clash of symmetrically organized, if not symmetrically capable, conventional armed forces, battlefields have seen a dramatic upswing in episodes of perfidy and other forms of allegedly treacherous warfare.[10] Dinstein observes, "One of the hallmarks of the hostilities in Iraq, in 2003, was that much of the fighting on the Iraqi side was conducted by 'fedayeen' who fought Coalition forces out of uniform."[11] After U.S.-led forces displaced the Iraqi Baathist regime, insurgents routinely feigned civilian status in connection with hostilities throughout Iraq. Repeated incidents of perfidy greatly compromised U.S. forces' trust that civilian persons and objects posed no threat.

A U.S. aviation commander describes routinely attacking planters, garbage piles, and vehicles outside Iraqi homes in response to enemy use of civilian cars and objects to house improvised explosive devises.[12] The commander relates, "[A]ny vehicle in the street was . . . destroyed. Any planter in the street was . . . destroyed by [aircraft] fire. Any garbage pile was . . . destroyed—anything Iraqis don't normally have outside of their home."[13]

Id. The report later cites incidents of Iraqi feigned surrender by means of displaying a white flag, raising hands and laying down weapons. When Coalition forces moved forward to accept the offer of surrender Iraqi forces fired from hidden positions. *Id.* The report concludes, however, that incidents of perfidy did not have a major effect on operations in the Persian Gulf War. *Id.*

[10] Joshua Rozenberg, *The Perils of Perfidy in Wartime*, TELEGRAPH (London), Apr. 3, 2003 (describing an Iraqi suicide attack killing four U.S. soldiers).

[11] Yoram Dinstein, *Jus in Bello Issues Arising in the Hostilities in Iraq in 2003*, 80 INT'L LEGAL STUD. 43 (2006); Richardson & Crona, *supra* note 7 (calling for prosecution of Iraqi perfidy against U.S. forces in 2003 invasion of Iraq). Richardson & Crona relate:

> Fedayeen fighters waved a white flag and then opened fire on U.S. soldiers preparing to accept surrender. Still another was the recent operation in which an ostensibly pregnant woman lured three American soldiers to their deaths by pretending to be in distress at a checkpoint and then detonating concealed explosives. We now know that those incidents were not acts of ad hoc martyrdom but instead were deliberated and sanctioned at the highest levels of the Iraqi hierarchy.

Id.; *see also* Glenn Collins, *Allied Advances, Tougher Iraqi Resistance, and a Hunt in the Tigris*, N.Y. TIMES, Mar. 24, 2003, http://www.nytimes.com/2003/03/24/world/overview-march-23-2003-allied-advances-tougher-iraqi-resistance-hunt-tigris.html; Brian Knowlton, *Bush Tells of 'Good Progress' But Says War Has Just Begun*, INT'L HERALD TRIB. (New York), Mar. 24, 2003, http://www.highbeam.com/doc/1P1-72794492.html.

[12] COMBAT STUDY INST., U.S. DEP'T OF ARMY, 1 EYEWITNESS TO WAR: THE US ARMY IN OPERATION AL FAJR, AN ORAL HISTORY 56 (Kendall D. Gott ed., 2006).

[13] *Id.*

Similarly, in the second battle for Fallujah, a rare instance when Iraqi and foreign insurgents committed to sustained, open battle with U.S. and Iraqi government forces, feigned civilian status appears to have been routine. A U.S. Army major observed,

> [I]t was a very simple tactic they would use—they knew that we wouldn't shoot at them if they didn't have a weapon, if they were walking in the street. So a lot of times they would fire from one building, drop their weapon and run to another building, where another cache was. We kept finding these caches strategically located throughout the city. So they'd run from one to another without a weapon thinking that we wouldn't shoot at them because that was against our ROE [rules of engagement]. But at that point, we were 100 percent sure that everyone to our front was enemy, and we were coming through to kill everything we possibly could as we came through the city. When you have to call that off, it's kind of a difficult thing. . . . [S]omeone would walk right through your formation or around your formation, count your people, and probably come back and shoot at you later on.[14]

Recent acts reminiscent of prohibited perfidy have become a familiar feature of hostilities short of international armed conflict as well,[15]

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[14] *Id.* at 231.

[15] Whether the perfidy prohibition operates identically, or at all, in non-international armed conflict (NIAC) remains subject to some debate. The most glaring evidence that States did not intend the prohibition to operate in NIAC is its omission from the 1977 Additional Protocol addressed to NIAC. *See* Protocol Additional to the Geneva Conventions of 13 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter 1977 Additional Protocol II]. Exclusion of perfidy as a NIAC law-of-war prohibition was clearly not an oversight or mistaken omission. The records of the 1974–77 Diplomatic Conference indicate States deliberately struck the prohibition. *Compare* 2 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 1974–1977, Draft Additional Protocol II, art. 21(1) [hereinafter OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE], *with* 1977 Additional Protocol II, *supra*. Notwithstanding, a number of commentaries suggest or conclude perfidy is equally prohibited in NIAC. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 222–23 (2005) [hereinafter ICRC CIL STUDY]; INST. OF INT'L HUMANITARIAN L., THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT ¶ 2.3.6 (Michael N. Schmitt, Charles H. B. Garraway, & Yoram Dinstein eds., 2006)

including the Colombia[16] and Gaza armed conflicts.[17] And the attacks of September 11, 2001 that launched the U.S. Global War on Terrorism, had they taken place in an unequivocally international armed conflict, would unquestionably have constituted prohibited law-of-war perfidy.[18] In fact, the U.S. congressional Authorization to Use Military Force referred to the 9/11 attacks as "acts of treacherous violence."[19] Even a U.S. operation in response to the September 11 attacks has seemingly skirted the line between perfidy and lawful ruse.[20]

[hereinafter NIAC MANUAL]. *But see* John C. Dehn, *Permissible Perfidy?: Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World's Reaction*, 6 J. INT'L CRIM. JUST. 627, 634–38 (2008) (criticizing the ICRC assertions with respect to perfidy in NIAC as overstated). States recently included perfidy among war crimes in NIAC in the Rome Statute of the ICC Rome Statute, *supra* note 8, art. 8(2)(e)(ix). Note, however, that the Rome Statute excludes capture as an effect of attack sufficient to establish perfidy. *Id.*

[16] Sibylla Brodzinsky & Caroline Davies, *Colombia Hostage Rescue: The Audacious Plot that Freed World's Most Famous Captive*, GUARDIAN (London), July 5, 2008, www.guardian.co.uk/world/2008/jul/06/colombia (describing Colombian operatives posing as a humanitarian non-governmental organization to free hostages held by the FARC); Chris Kraul, *The Ultimate Fake-Out*, L.A. TIMES, July 4, 2008, articles.latimes.com/2008/jul/04/world/fg-hostagetictoc4 (describing Colombian use of a false humanitarian emblem to free hostages and resulting in capture of FARC fighters). *See generally* Dehn, *supra* note 15.

[17] U.N. Human Rights Council, Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, A/HRC/12/48, ¶ 1106 (Sept. 25, 2009), *available at* http://www2/pjcjr/prg/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf (finding violation of perfidy prohibition by feigning presence of ICRC delegation to secure enemy surrender).

[18] *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 1–10 (2004) (describing use of civilian attire to gain access to and take control of civilian aircraft for purposes of fatal attacks); *see also* discussion *supra* note 15 (noting debating concerning the state of perfidy in the law of non-international armed conflict).

[19] Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) [hereinafter AUMF]. Although Congress's constitutional power includes the authority to "define and punish offenses against the law of nations," it is unlikely the AUMF's preamble is an exercise of this function. U.S. CONST. art. I, § 8, cl. 10. The AUMF use of the term "treacherous" is more likely political in this instance rather than legal. AUMF, *supra*.

[20] A May 2011, U.S. Central Intelligence Agency and special operations force's operation against al-Qaeda leader Osama bin Laden reportedly gained intelligence, including DNA samples of the bin Laden family, by sending an operative posing as a medical worker administering vaccinations to bin Laden's compound in Abbottabad, Pakistan. Mark Mazetti, *Vaccination Ruse Used in Pursuit of Bin Laden*, N.Y. TIMES, July 11, 2011, http://www.nytimes.com/2011/07/12/world/asia/12dna.html?_r=0.

B. Perfidy in Law-of-War Enforcement

Perfidy also appears as a component of modern law-of-war enforcement mechanisms.[21] For example, the U.S. Department of Defense Office of Military Commissions is currently prosecuting the charge of "using treachery or perfidy" against several detainees. The specification of a perfidy charge against al-Nashiri reads:

> In that Abd al Rahim Hussayn Muhammad a1 Nashiri, an alien unprivileged enemy belligerent subject to trial by military commission, did, in or around Aden, Yemen, on or about 12 October 2000, in the context of and associated with hostilities, invite the confidence and belief of one or more persons onboard USS Cole (DDG 67), including but not limited to then FN Raymond Mooney, USN, that two men dressed in civilian clothing, waving at the crewmembers onboard USS Cole (DDG 67), and operating a civilian boat, were entitled to protection under the law of war, and intending to betray that confidence and belief, did thereafter make use of that confidence and belief to detonate explosives hidden on said civilian boat alongside USS Cole (DDG 67), killing 17 Sailors of the United States Navy and injuring one or more persons, all crewmembers onboard USS Cole (DDG 67).[22]

A second accused, Abd al Hadi al-Iraqi, is charged with "using treachery or perfidy" in connection with attacks carried out in Afghanistan and

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[21] Major Byron D. Greene, *Bridging the Gap that Exists for War Crimes of Perfidy*, ARMY LAW., Aug. 2010, at 45, 45; Major E. John Gregory, *Trying Unlawful Combatants at General Courts-Martial: Amending the UCMJ in Light of the Military Commissions Experience*, 203 MIL. L. REV. 150 (2010).

[22] MC Form 458, Referred Charge Sheet, Abd al Rahim Hussayn Muhammad al-Nashiri, at 8 (Office of Military Comm'ns, U.S. Dep't of Def., 28 Sept. 2011), *available at* http://www.mc.mil/Portals/0/pdfs/alNashiri/Al%20Nashiri%20(AE001)%20Referred%20Charge%20Sheet.pdf. It will be interesting to learn whether Al-Nashiri's military commission applies rules of treachery and perfidy which have been more lenient concerning feigned civilian status in preparation for attack. *See, e.g.*, Matthew Morris, *'Hiding Amongst a Crowd' and the Illegality of Deceptive Lighting*, 54 NAVAL L. REV. 235, 236, 239–42 (2007) (citing INST. OF INT'L HUMANITARIAN L., SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICT AT SEA ¶¶ 110–11 (1994)).

Pakistan between 2003 and 2004.[23] Al Hadi's military commission charge sheet alleges he ordered or supported numerous fatal attacks employing car bombs disguised as innocent civilian vehicles. A representative specification of Al Hadi's charge sheet reads in relevant part:

> In that Abd al Hadi al-Iraqi . . . did . . . invite the confidence and belief of at least one person that a vehicle appearing to be a civilian vehicle was entitled to protection under the law of war, and, intending to use and betray that confidence and belief, did, thereafter, make use of that confidence and belief to detonate explosives in said vehicle thereby attacking a bus carrying members of the German military, resulting in death and injury to at least one of those German military members.[24]

A third U.S. military commission's charge sheet, working its way through the Office of the Military Commissions Prosecutor in early 2013, included a perfidy charge against Ali Musa Daqduq, a Hezbollah operative. Daqduq was to be charged, *inter alia*, with using U.S. and Iraqi uniforms in an attack on U.S. forces in Iraq.[25] The tentative charges against Daqduq focused on improper use of enemy uniforms,[26] but also included a specification of law-of-war perfidy based on the same attack.[27] Although the attack produced the requisite casualties for perfidy, his use of enemy uniforms or feigning friendly force status does not classically constitute resort to a law-of-war protected status as friendly forces do not enjoy law-of-war protection from their comrades. Accordingly, Daqduq's conduct seems more consistent with improper

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[23] Military Commissions Form, MC 458, Charge Sheet, Abd al Hadi al-Iraqi, at 10 (Office of Military Comm'ns, U.S. Dep't of Def., 5 Feb. 2012) [hereinafter Hadi Charge Sheet], *available at* http://www.mc.mil/Portals/0/pdfs/alIraqi/ChargingDocumentAbdalHadialIraqiFeb2014.pdf.

[24] *Id.*

[25] Charlie Savage, *Prisoner in Iraq Tied to Hezbollah Faces U.S. Military Charges*, N.Y. TIMES, Feb. 23, 2012, http://www.nytimes.com/2012/02/24/world/middleeast/us-approves-military-tribunal-case-for-detainee.html?_r=0 (including a link to a .pdf copy of the eight-page draft charge sheet).

[26] MC Form 458, Charge Sheet, Ali Musa Daqduq al Musawi, at 3 (Office of Military Comm'ns, U.S. Dep't of Def., 3 Jan. 2012) (Charge I, Specifications 1–5), *available at* http://www.documentcloud.org/documents/302052-daqduq-tribunal-chargesheet.html.

[27] *Id.* at 4 (Charge III, the Specification).

use of enemy uniforms than with perfidy.[28] Whether the charge reflected a change in the official U.S. position is at present uncertain.[29] Still, the charge reflected prosecutors' intuitive, if not considered, attention to perfidy in contemporary armed conflict.

C. Perfidy in Cyber Warfare

The potential for perfidy to address what is distasteful about or dishonorable in modern warfare is not limited to recent or even purely physical hostilities. States increasingly regard cyberspace as a critical domain of warfare.[30] As with other emerging forms of warfare, perfidy appears at first blush to capture much of what is intuitively objectionable about cyber attacks. Most cyber attacks seem somehow underhanded and dishonest. Popular conceptions of how they work almost always envision deception or nefarious misrepresentation. Indeed, many forms of malicious code actually rely on betrayals of good faith to succeed, presenting themselves as innocuous updates or messages. The Trojan horse e-mail is representative, usually posing as an innocuous message to secure the recipient's trust. The Trojan horse then betrays this trust, unleashing harmful or destructive code into the target's system.

While cyber attacks appear in a variety of forms—many involving little if any overt deception or misrepresentation—the potential for misrepresentations, deceit, and resulting distrust abounds. More important, cyber hostilities illustrate clearly the potential for harm achieved by deception to undermine confidence in a vital mode of human interaction. Distrust dominates cyber dialogue to the point of distraction. It is clear the deception and betrayals occurring in cyberspace have greatly undermined public confidence in electronic communications as a mode of human interaction. Just as these betrayals have undermined confidence in cyber means as a trustworthy mode of human exchange,

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[28] *See* discussion *supra* accompanying note 137.

[29] This uncertainty is likely to persist as Iraqi authorities recently released Daqduq from custody permitting him to return to his native Lebanon. Matthew Levitt, *Malaki Government's Whitewashing of Hezbollah*, WKLY. STANDARD (Wash., D.C.), Nov. 20, 2012, http://www.weeklystandard.com/blogs/maliki-government-s-whitewashing-hezbollah_663733.html; Michael R. Gordon, *Against U.S. Wishes, Iraq Frees Man Accused of Killing US Soldiers*, N.Y. TIMES, Nov. 16, 2012, http://www.nytimes.com/2012/11/17/world/middleeast/iraq-said-to-release-hezbollah-operative.html.

[30] *See, e.g.*, U.S. DEP'T OF DEF., STRATEGY FOR OPERATING IN CYBERSPACE 5 (2011) (resolving to treat cyberspace as operational domain).

the betrayals involved in bad faith resort to law-of-war protections threaten the viability of the law of war itself as a means of humanitarian exchange between belligerents.

How the law of war will regulate deception and violations of good faith in cyber warfare and other emerging forms of hostilities is sure to be critical to reviving confidence in humanitarian rules as reliable and trustworthy modes of human interaction, particularly during armed conflict. An account of how the current perfidy prohibition evolved offers both doctrinal clarity as well as a menu of law-making options for a perfidy prohibition better suited to the challenges of emerging warfare.

II. Law-of-War Perfidy Codified

The prohibition of perfidy can be called a dual-source rule, appearing in the law of war as both a specific prohibition and a general rule. Through the twentieth century, the States transformed a loosely defined perfidy rule that governed means and methods of warfare broadly into a discrete and technical bar of a narrow range of behavior activated only by strictly prescribed physical consequences to persons. Thus a complete understanding of perfidy requires familiarity with a host of specific law-of-war treaty provisions, general law-of-war principles, military customs and usage, as well as a working knowledge of law-of-war methodology and organization.

A. Perfidy and the Law-of-War Progression

The law of war has long operated within and through a series of legal bifurcations. To begin, international jurists have recognized private international law and public international law as distinct legal regimes.[31] Public international law in turn has been comprised of laws of war and laws of peace.[32] Within that bifurcation, the law of war itself is split into

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[31] *See, e.g.*, GEORGE GRAFTON WILSON & GEORGE FOX TUCKER, INTERNATIONAL LAW 4 (6th ed. 1915).

[32] *See, e.g.*, CHARLES H. STOCKTON, OUTLINES OF INTERNATIONAL LAW (1914) (dividing Public International Law coverage into "Intercourse of States in Time of Peace" and War-Relations of Belligerents"). The emergence of international human rights law, especially if understood to operate in armed conflict, challenges the war-peace bifurcation of public international law.

a *jus ad bellum*, regulating States' resort to force,[33] and a *jus in bello*, regulating conduct during hostilities.[34] The *jus in bello* in turn has been split, conceptually if not literally, into rules applicable to targeting, formerly termed Hague Law, and rules for treatment of persons under control of an enemy belligerent, so-called Geneva Law.[35] Alongside this tree of bifurcations, one can overlay two somewhat separate sources of the law of war; like international law generally, law-of-war obligations exist in both treaty and customary form.[36]

In addition to splitting the *sources* of regulation of war, States have bifurcated the *modes* of regulating conduct in war.[37] In many cases, States have developed specific, codified prohibitions to limit belligerents' use of the means and methods of war. At the same time, States have accepted restraints on the conduct of hostilities in the form of broadly conceived, general principles. Expressions of each mode of regulation, specific prohibition and general principle, can be found in either treaty or customary form.

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[33] *See generally* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE (5th ed. 2011) (offering a particularly positivist analysis of modern *jus ad bellum* doctrine); STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY (2005) (providing a rich history of the legal nature and legal conceptions of war under international law).

[34] *See generally* 1 MARCO SASSÒLI, ANTOINE A. BOUVIER & ANNE QUINTIN, HOW DOES LAW PROTECT IN WAR? (3d ed. 2011) (offering a thorough and well-cited outline of the modern *jus in bello*); GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT (1983) (providing a sound and thorough historical account of the *jus in bello*).

[35] *See* Geoffrey S. Corn & Eric Talbot Jensen, *Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror*, 81 TEMP. L. REV. 787, 793–96 (2008) (explaining the twentieth-century evolution and eventual merger of the Hague and Geneva traditions of the law of war); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108–09 (2004).

[36] *See* SASSÒLI ET AL., *supra* note 34, at 149–50, 152–54.

[37] A further bifurcation of law-of-war regulations is evident in the traditional sources of regulation. Like international law generally, law-of-war provisions take both customary and treaty forms. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 10–14 (2d ed. 2010). A number of sources have collected the major law-of-war treaties. THE LAWS OF ARMED CONFLICTS: A COLLECTION CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004) [hereinafter Schindler & Toman]; ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR (3d ed. 2000). The International Committee of the Red Cross completed a 3-volume codification of the customary law of war in 2005. ICRC CIL STUDY *supra* note 15.

1. Specific Prohibition

The specific prohibitions of the *jus in bello* surface as both stand-alone treaties[38] and as protocols to preexisting treaty regimes.[39] Whatever their legal configuration, law-of-war rules that materialize as specific prohibitions share the usual advantages of codified law. In many cases, they reduce ambiguity.[40] A number of specific law-of-war prohibitions include consecutive or cumulative elements of application and descriptive instructions that greatly aid implementation.[41] For

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[38] The fielding and use of exploding projectiles, military balloons, poisonous gases, and cluster munitions each produced important new treaties to account for respective impacts on the conduct of hostilities and the victims of war. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, *opened for signature* Nov. 29, 1868, 18 Martens Nouveau Recueil (ser. 1) 474 (entered into force Dec. 11, 1868) [hereinafter 1868 Saint Petersburg Declaration]; Hague IV, Declaration I, Concerning the Prohibition, for the Term of Five Years, of the Launching of Projectiles and Explosives from Balloons or Other New Methods of a Similar Nature, July 29, 1899, 32 Stat. 1839, 1 Bevans 270, 26 Martens Nouveau Recueil (ser. 2) 994; Geneva Protocol for the Prohibition on the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods in Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65; Convention on Cluster Munitions, May 30, 2008, 48 I.L.M. 357.

[39] Submarines, and, more recently, non-detectable fragments, anti-personnel mines, and blinding lasers have produced protocols to existing law-of-war treaties. *See* Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of 22 April 1930, Nov. 6, 1936, 173 L.N.T.S. 353; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Apr. 10, 1981, 1342 U.N.T.S. 137 [hereinafter 1980 Convention on Conventional Weapons]; Protocol on Non-Detectable Fragments (Protocol I), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Oct. 10, 1980, 1342 U.N.T.S. 168; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), as amended on May 3, 1996, 2048 U.N.T.S. 133; Protocol on Blinding Laser Weapons (Protocol IV), Oct. 13, 1995, 2042 U.N.T.S. 171. Blinding lasers present an interesting case. States concluded the Blinding Lasers Convention prior to any acknowledged battlefield use or fielding of weapons meeting the treaty's definition of such weapons.

[40] International law, including the law of war, generally recognizes as sources of legal obligations both codified international instruments such as treaties, as well as the customary practice of States undertaken from a sense of obligation, whether codified or not. Statute of the International Court of Justice, art. 38(1)(a) & (b), June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179 [hereinafter ICJ Statute].

[41] *See*, *e.g.*, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 13, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter 1977 Additional Protocol I]. Medical units and hospitals have long enjoyed specific protection from attack. Protection ceases only if medical facilities are used for hostile purposes. The Additional Protocol rule specifies four acts not considered hostile and also prescribes fairly elaborate procedures for

example, Article 4 of the Third Geneva Convention of 1949 lists several criteria that militia and volunteer corps must satisfy for their members to enjoy prisoner of war status upon capture.[42]

Resort to specific provisions is often viewed as a progressive development in humanitarian terms. The massively influential commentaries to the 1949 Geneva Conventions observe with respect to the Third Convention, "The time for declarations of principle is past; the 1929 Convention showed the advantages to be gained from detailed provisions."[43] In practical terms, specific prohibitions ease incorporation into military doctrine. Instruction of military lawyers also seems an easier task when based on specific provisions. And converting specific law-of-war provisions into element-based offenses favored by criminal courts seems far easier than distilling general principles into chargeable crimes.[44] The task of military legal advisors is in some sense easier when specific law-of-war prohibitions are encountered as well. While specific prohibitions typically grant less operational flexibility, they offer comparatively stronger support to military lawyers advising against unlawful military plans than general principles.

To some extent, the international legislative process that generates specific prohibitions also enriches and refines the law of war. It is rare to find a specific prohibition derived solely from custom. Specific law-of-war prohibitions typically result from formidable diplomatic conferences attended by States' official representatives. To an increasing degree, non-governmental organizations and other private humanitarian interests also participate in law-of-war treaty conferences voicing diverse interests and useful non-military perspectives.[45] Official statements and recorded

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attacking misused medical facilities, including warnings and a period for rehabilitation. *Id.*

[42] Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter 1949 Geneva Convention III].

[43] COMMENTARY, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 10 (Jean Pictet ed., 1960).

[44] The subject matter jurisdiction of the International Criminal Court Statute includes a number of specific law-of-war prohibitions., ICC Rome Statute, *supra* note 8, art. 8. Elements of these prohibitions facilitate prosecution of war crimes. Int'l Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002), *reprinted in* KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2003).

[45] Zoe Pearson, *Non-Governmental Organizations and The International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 254 (2006) (relating at the Rome Statute Conference, NGO influence "was crucial to the

exchanges of States' views on contentious law-of-war issues produce valuable legislative histories, record accepted understandings of adopted text, and identify the outer limits of substantive consensus on discrete and emerging legal issues.

Finally, specific law-of-war prohibitions bolster legal legitimacy.[46] They provide States unequivocal opportunities to consent to or to reject international rules. Public international law, including the law of war, remains fundamentally a consent-based system of regulation.[47] Few sources of international law match ratification of a specific prohibition as an indication of consent to regulation and therefore regulatory legitimacy. Treaty ratification reflects more than approval of substantive rules. Ratification is evidence of a State's clear willingness to cede sovereignty and prerogative to the international legal system. Likewise, rejection of a specific prohibition, a proposed provision, or a prohibition accepted as part of a treaty is strong evidence of either a State's

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outcome of particular statue provisions") (citing Marlies Glasius, *Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court*, *in* GLOBAL CIVIL SOC'Y 137 (2002)). The Rome Statute Diplomatic Conference was not the first to include NGOs and international organizations. The 1974–1977 diplomatic conferences that produced the Additional Protocols to the 1949 Geneva Conventions included scores of NGOs and even liberation movements including, the African National Congress, the Palestine Liberation Organization, the United Nations Children's Fund (UNICEF), and Amnesty International. 2 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 15, at 351–408.

[46] *See* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 261, 265 (1940) (citing Lassa Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L. L. 313, 333 (1908)). *But see* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 5–6, 177 (Robert Tucker ed., 2d ed. 1966) (describing international law as essentially normative in character, as distinguished from rule-based).

[47] *See* Vienna Convention on the Law of Treaties, arts. 11–15, 17, May 23, 1969, 1155 U.N.T.S. 331 (regulating means of State consent to treaties) [hereinafter Vienna Convention]; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14, ¶ 269 (June 27); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 4 (6th ed. 1995); Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 109 (2012) (describing established doctrine as "the sum total of obligations consented to by states"); Duncan Hollis, *Why Consent Still Matters: Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137 (2005); Steven R. Ratner & Anne-Marie Slaughter, *Appraising Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 293 (1999). *Contra* Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012) (arguing for moderation of the consent requirement in international law).

disagreement with substantive norms, or, more fundamentally, its reluctance to commit the issue to the international legal system at all.[48]

2. General Principles and Customs

As an alternative mode of regulating hostilities, States have resorted to custom and general principles.[49] International custom and principles regulated warfare long before the advent of multilateral law-of-war treaties and conventions.[50] And after more than a century of international codification of specific prohibitions, law-of-war principles still perform critical regulatory functions in combat.[51] Rather than address or prohibit specific means or methods of war, law-of-war principles regulate broadly, even generically.

Widely accepted law-of-war principles include military necessity, distinction, proportionality, and humanity.[52] Each principle reflects, and

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[48] A contingent of international lawyers has remained skeptical of the value of codification. In the heyday of positivist efforts, Oppenheim admitted that codification retards the "organic growth of the law through usage into custom." LASSA OPPENHEIM, INTERNATIONAL LAW 40–41 (2d ed. 1912).

[49] This article uses the term "principles" to refer to core rules that form part of the international customary law applicable in armed conflict. I do not mean to refer to "general principles of law" as a more general source of international obligations and authority. *See* ICJ Statute, *supra* note 40, art. 38(a)(3); IAN BROWNLIE, PUBLIC PRINCIPLES OF INTERNATIONAL LAW 16–17 (7th ed. 2008). Brownlie and other prominent commentators identify "general principles of law recognized by civilized States" as a source of international law drawn primarily from municipal legal systems, in particular from private law. *Id.* at 17; 1 GERHARD VON GLAHN, LAW AMONG NATIONS 18 (7th ed. 1996); INTERNATIONAL LAW: THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 68 (Elihu Lauterpacht ed., 1970). Oppenheim, however, identifies a "*general* International Law" captured by treaty rather than custom. OPPENHEIM , *supra* note 48, at 23–24.

[50] Thomas Holland, a critical figure in late-nineteenth century efforts to codify the laws and customs of war, observed, "The evolution of customary rules, designed to lessen the sufferings resulting from warfare, was the earliest achievement of the nascent science of International Law." THOMAS ERSKINE HOLLAND, THE LAWS OF WAR ON LAND (1908); *see also* HILAIRE MCCOUBREY & NIGEL WHITE, INTERNATIONAL LAW AND ARMED CONFLICT 210–17 (1992) (recounting pre-twentieth century evolution of law-of war principles and customs)

[51] INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 10–14 (2013) (identifying four principles of the law of war, including military necessity/military objective, distinction/discrimination, proportionality, and humanity/unnecessary suffering).

[52] Law-of-war commentators continue to debate the precise and even general nature of these values. Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, *in* THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 185, 189

through application or enforcement, vindicates enduring human values judged important enough to survive the breakdown of order that accompanies armed conflict. In contrast to many specific prohibitions, law-of-war principles operate nearly universally, paying far less regard to technical legal elements, peculiarities of conflict classification,[53] or the legal status of affected persons.[54] Accordingly, general law-of-war principles are often well-suited to emerging military technology and tactics not anticipated or addressed by specific law-of-war prohibitions.

True to their mutable form, law-of-war principles remain in flux, frequently lack precise meaning and content, and are often subject to

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(Michael N. Schmitt & Leslie C. Green, eds., 1998) ("The law of armed conflict (or international humanitarian law) is primarily concerned with preserving, as far as possible, certain core humanitarian values during hostilities.").

[53] As a matter of material application, the law of war operates only in conditions of armed conflict. 1977 Additional Protocol I, *supra* note 41, art. 1; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter 1949 Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter 1949 Geneva Convention II]; 1949 Geneva Convention III, *supra* note 42, art. 2; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter 1949 Geneva Convention IV]. States have not committed to a treaty-based definition of armed conflict. The most widely-accepted definition of this threshold describes armed conflict as, "protracted armed violence." Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). In a well-documented study of the customary law of war, the International Committee of the Red Cross concluded that each of the four principles of the law of war operates in both international and non-international armed conflicts. ICRC CIL STUDY, *supra* note 15, at 3–5, 29–-32, 46–49, 237–40. Similarly a manual dedicated to identifying law-of-war rules applicable in non-international armed conflict concludes that three principles apply to such conflicts. NIAC MANUAL, *supra* note 15, ¶ 1.2 (identifying "distinction, prohibition of necessary suffering, and humane treatment"). Omission of the principles of proportionality and military necessity appear to be judgments as to their inclusion in the principle of distinction rather than a conclusion that neither applies in non-international armed conflict. *Id*.

[54] Many specific prohibitions of the law of war operate under quite narrow circumstances or in favor of discrete classes of persons on the battlefield. For instance, most of the Geneva Conventions' specific prohibitions concerning the treatment of interned persons operate only in favor of captives who meet rigorous qualification standards for the status of prisoner of war or civilians whose nationality qualifies them as protected persons. *See* 1949 Geneva Convention III, *supra* note 42, art. 4; 1949 Geneva Convention IV, *supra* note 53, art. 4.

dispute.[55] A small sampling of authoritative law-of-war sources finds mention of as few as two and as many as six principles.[56] Although on occasion codified by treaty, law-of-war principles generally take shape as diffuse custom or in the form of widely varied and uncodified State practice. Predictably then, regulation by principle has proved a relatively indeterminate but flexible method of restraining conduct in warfare, especially in comparison with regulation by specific prohibitions.

Although doctrinally separate, these two modes of law-of-war regulation, specific provision and general principle, have not been distinct in terms of coverage. Many specific law-of-war prohibitions find inspiration in, execute, or merely duplicate one or more law-of-war principles.[57] And conversely, it can often be said that law-of-war

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[55] Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 247 (1996) ("In international humanitarian law, change through the formation of custom might be faster, but less precise in content, that the adjustment of law through treaty making.").

[56] The U.S. Supreme Court has identified on three occasions three maxims of the law of war including, "humanity, moderation, and honor." Williams v. Bruffy, 96 U.S. 176, 191 (1877); *In re* The Brig Amy Warwick, 67 U.S. (2 Black) 635, 667 (1862); Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (quoting EMMERICH DE VATTEL, 3 LE DROIT DE GENS OU PRINCIPES DE LA LOI NATURELLE, ch. 8, §§ 294–95 (1758). U.S. NAVY/U.S. MARINE CORPS/U.S. COAST GUARD, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7A, ¶ 5.3 (2007) (identifying Military Necessity, Distinction, Proportionality, and Unnecessary Suffering); U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383, ¶¶ 2.2–2.6 (2004) (identifying Military Necessity, Humanity, Distinction, and Proportionality) [hereinafter UK MANUAL]; OFFICE OF THE JUDGE ADVOCATE GENERAL, CANADIAN ARMED FORCES, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, B-GJ-005-104/FP-021 ¶ 202.1 (2001) [hereinafter CANADIAN MANUAL] (identifying Military Necessity, Humanity, and Chivalry); FED. MINISTRY OF DEF. OF FED. REPUBLIC OF GER., HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL (ZDv 15/2) ¶ 131 (1992) [hereinafter GERMAN IHL MANUAL] (identifying Military Necessity and Humanity); U.S. DEP'T OF ARMY, FM 27-10, THE LAW OF LAND WARFARE ¶ 3 (1956) [hereinafter FM 27-10] (identifying Necessity, Humanity, and Chivalry as basic principles). A draft manual intended to replace the U.S. Army's aging law-of-war manual includes five principles including: Military Necessity, Humanity, Discrimination, Proportionality, and Honor. U.S. DEP'T OF DEF., JOINT SERVICE LAW OF WAR MANUAL ¶¶ 2.002–2.006 (draft Dec. 2010) [hereinafter U.S. DRAFT MANUAL] (on file with author). A casebook published by the International Committee of the Red Cross identifies six principles of International Humanitarian Law including, humanity, necessity, proportionality, distinction, prohibition on causing unnecessary suffering, and independence of *jus in bello* from *jus ad bellum*. SASSÒLI ET AL., *supra* note 34, at 161–62.

[57] *See, e.g.*, 1977 Additional Protocol I, *supra* note 41, art. 56. Article 56 prohibits targeting dams, dykes, and nuclear electrical generating stations where attack would release dangerous and cause severe loss to civilian populations. This specific prohibition clearly captures the principles of discrimination and proportionality. *See* INT'L COMM. OF

principles capture or represent aggregations of fairly specific, codified prohibitions.[58] While splitting the *jus in bello* between specific prohibitions and broad principles has offered States regulatory diversity and flexibility, the arrangement has rendered many of the precise contours of the law elusive. This is particularly true where one finds overlap between the two modes of regulation, as has been the case with perfidy for over a century.

THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶¶ 2152–58 (Yves Sandoz et al. eds., 1987). Emphasizing the prohibition's roots in principle, the United States has contested the customary nature of Article 56 because, in its view, the principles adequately vindicate the concern of the rule. *See* Michael J. Matheson, *Remarks in Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Convention*, 2 AM. U. J. INT'L L. & POL'Y 419, 427 (1987); Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 467–68 (1987) (judging Article 56 to be "militarily unacceptable"); *see also* Memorandum from Mr. W. Hays Parks, Chief, Int'l Law Branch, Office of The Judge Advocate Gen., U.S. Army, et al., to Mr. John H. McNeill, Assistant Gen. Counsel, Office of the Sec'y of Def., subject: 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implication (9 May 1986), *reprinted in* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234–35 (Major William J. Johnson ed., 2013) [hereinafter McNeill Memorandum] (declining to include 1977 Additional Protocol I, Article 56 among provisions reflective of custom or as supportable for inclusion as such).

[58] For example, States codified the widely recognized principle of discrimination in a 1977 Protocol to the 1949 Geneva Conventions. Article 48 of the Protocol states, "In order to ensure respect for and protection of the civilian population, and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives." 1977 Additional Protocol I, *supra* note 41, art. 41. Article 51 further converts the principle of discrimination into specific prohibitions. A series of discrimination-inspired prohibitions includes attacks "not directed at a specific military objective . . . which employ a method or means of combat which cannot be directed at a specific objective or . . . employ a method or means of combat the effects of which cannot be limited." *Id.* art. 51(4). Unlike the 1949 Conventions, ratification of Additional Protocol I is not universal. *See Treaties and States Parties to Such Treaties*, ICRC, http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470 (last visited Apr. 28, 2014) (identifying 177 States Parties to AP I); Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275 (1965) (explaining inputs to customary law of war).

B. Early Codifications

Perfidy appeared as a codified and specific law-of-war prohibition in the mid-to-late nineteenth century. Nearly every comprehensive law-of-war instrument of the period included prohibitions on perfidy or treachery. While nineteenth century enthusiasm for positive law is evident in these early codes and treaties, expressions on the subject of perfidy remained vague. Early prohibitions seem to have reserved a great deal to the subjective prerogatives of the armed forces expected to honor them. Still, one finds in these early instruments the beginnings of a specific prohibition of perfidy.

1. U.S. Liber Code

Widely recognized as the first serious codification of the customs and usages of war and issued in the form of instructions to Union forces in the American Civil War, the U.S. Lieber Code included two expressions of customary military practice with respect to perfidy or treachery.[59] Articles 16 and 101 of the Lieber Code instructed:

> Art. 16. Military necessity . . . admits of deception, but disclaims acts of perfidy . . . .
>
> . . . .

[59] Adjutant Gen.'s Office, U.S. Dep't of War, Gen. Orders No. 100 (24 Apr. 1863) [hereinafter Lieber Code] (titled *Instructions for the Government of Armies of the United States in the Field*), *reprinted in* Schindler & Toman, *supra* note 37, at 3. Elihu Root, *Francis Lieber, Opening Address at American Society of International Law Meeting, April 24, 1913*, 7 AM. J. INT'L L. 453 (1913). The Code was the work of law professor Dr. Francis Lieber. A board of officers including Generals Hitchcock, Cadwalader, Harstuff, and Martindale, along with Lieber himself, reviewed the project. The Code likely included as many subjective evaluations of lawful conduct as it did objective codifications of practice or custom. *See* James F. Childress, *Francis Lieber's Instructions of the Laws of War: General Order No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34 (1976). Childress observes, "More than a collection of independent rules, this code had its rationale in its author's experiences of and systematic thought about war . . . ." *Id.* at 34. Childress also notes, "In his effort to codify the 'common law of war,' Lieber did not merely attend to the practices of nations, although these were important." *Id.* at 40. *See also* Richard R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100 (Part I)*, 3 INT'L REV. RED CROSS 171 (1963); Richard R. Baxter, *The First Modern Codification of the Law of War: Francis Lieber and General Orders No. 100 (Part II)*, 3 INT'L REV. RED CROSS 234 (1963); Root, *supra*.

> Art. 101. While deception in war is admitted as a just and necessary means of hostility, and is consistent with honorable warfare, the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them.[60]

While undoubtedly important codifications, Lieber's formulations of perfidy present modern readers a number of interpretive dilemmas. First, the reference to clandestine attempts at injury is ambiguous even to those familiar with military customs of the period. In military usage, clandestine operations commonly refer to missions of concealed existence.[61] Although the Code separately addresses the practices of spies[62] and traitors[63] whose pursuits often involve clandestine acts, no accompanying article of the Code defines a clandestine attempt or employs the term. A treatise contemporary to the Code described prohibited assassinations as involving "the cover of a disguise," perhaps indicating the type of operation envisioned by Lieber.[64] Yet the same treatise describes spying as "a kind of clandestine practice . . . *allowable* by . . . rules."[65] Moreover, General Henry Halleck's international law treatise, known to have greatly influenced Lieber, observed, "The implements of war, which may be lawfully used against an enemy, are not confined to those which are openly employed to take human life . . . but also include *secret and concealed* means of destruction . . . ."[66] Secrecy has long been an acceptable, even imperative aspect of military operations.[67] Therefore, it is doubtful that Lieber's prohibition of clandestine injury intended that all secret or concealed operations would qualify under the article's prohibition of perfidy.

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[60] Lieber Code, *supra* note 59, arts. 16, 101.

[61] JOINT STAFF, U.S. DEP'T OF DEF., JOINT PUB. 1-02, DICTIONARY OF MILITARY AND ASSOCIATED TERMS (15 July 2012) (citing JOINT STAFF, U.S. DEP'T OF DEF., JOINT PUB. 2-01.2 COUNTERINTELLIGENCE AND HUMAN INTELLIGENCE SUPPORT TO JOINT OPERATIONS (date unknown due to classification)); William Safire, *Covert Operation or Clandestine?*, N.Y. TIMES, Feb. 14, 2005, http://www.nytimes.com/2005/02/13/arts/13iht-saf14.html.

[62] Lieber Code, *supra* note 59, art. 103.

[63] *Id.* arts. 90–91.

[64] 1 HENRY W. HALLECK, HALLECK'S INTERNATIONAL LAW 565 (Sherston Baker, ed., 3d ed. 1893) (1861).

[65] *Id.* at 571.

[66] *Id.* at 562 (emphasis added).

[67] Nina Stewart, *Commentary* in STRATEGIC DENIAL & DECEPTION: THE TWENTY-FIRST CENTURY CHALLENGE 36–38 (Roy Goodson & James J. Wirtz eds., 2002) (discussing maintenance of secrecy in strategic and tactical deception plans).

By comparison, it is likely that Lieber's reference to treachery or "treacherous attempts" was clearer to military practitioners of the time and operated with greater doctrinal force than did his treatment of clandestine operations.[68] The Code does not define treachery, or perfidy for that matter. Yet given the longstanding legal significance of perfidy and treachery, military leaders of the period would likely have held definite notions of each concept. In fact, military officers and commanders of the period carried out many legal functions without the assistance of military lawyers.[69] Court-martial practice of the period typically used line and staff officers appointed as *ad hoc* judge advocates, instead of members of the Judge Advocate Department.[70] Consequently, line officers and commanders had comparatively greater familiarity and facility with legal terms and general concepts of law than one finds today.[71] It would not have been surprising for military commanders of the period to have held relatively firm understandings of

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[68] Contemporaries of Lieber such as General Henry Halleck, a formidable jurist in his own right, regarded the Code as merely "'principles of the law of war, or the general rules . . . .'" Childress, *supra* note 59, at 36 (quoting Letter from General Henry Halleck, to General S.A. Hurlburt (June 22, 1863) (on file with Eldridge Papers, Huntington Library). General Halleck emphasized the importance of clarifying the Code through application "'in actual and hypothetical cases.'" *Id.*

[69] Many preliminary legal matters associated with courts-martial did not require participation of a judge advocate. 1 COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 190 (2d ed., 1920 reprint).

[70] *Id.* at 183, 185. Winthrop observed,

> While judge advocates are more commonly selected from officers of the line, it is by no means unusual to detail staff officers as such at remote posts or where the command is supplied with but a limited number of line officers. Under such circumstances, assistant surgeons especially have been thus employed.

Id. at 183.

[71] Military commanders have long been the focal point of military justice procedures. Prior to 1920 amendments, the U.S. military justice system was administered almost entirely by commanders without appellate oversight and scant legal review. Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 426 (2008). Summary court-martial procedures are still usually conducted exclusively by line officers without direct involvement of military lawyers. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1301(e) (2012) [hereinafter 2012 MCM] ("The accused at a summary court-martial does not have the right to counsel."). *See also* Middendorf v. Henry, 425 U.S. 25 (1976) (denying right to counsel in summary courts-martial); GREGORY E. MAGGS & LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES & MATERIALS 50 (2012) (discussing the role of the commander in military justice).

what constituted treachery without the aid of a technical definition or formal legal advice.

It is also likely that the treachery article's open-ended phrasing was intended to convey room for subjective interpretation.[72] Lieber's work is in fact styled as instructions to armed forces rather than a legal code or hornbook, reinforcing the understanding that he wrote for a lay audience. Lieber likely understood contemporary law-of-war custom to include a perfidy prohibition broad enough to cover a wide range of dishonorable belligerent activity. His separate treatment of permissible and impermissible deception supports the notion that Lieber comprehended a flexible, yet shared understanding of honorable and good faith conduct between warring parties. For example, his Code defines permissible deception to include only acts that do not "involve the breaking of good faith either positively pledged . . . or supposed by the modern law of war to exist."[73] Three negative examples clarify Lieber's notions of honorable combat:

> Art. 63. Troops who fight in the uniform of their enemies, without any plain, striking, and uniform mark of distinction of their own, can expect no quarter.
>
> Art. 65. The use of the enemy's national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which they lose all claim to the protection of the laws of war.
>
> Art. 117. It is justly considered an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection. Such an act of bad faith may be good cause for refusing to respect such flags.[74]

Thus, while undoubtedly an important starting point for later, more specific prohibitions on perfidy, the Lieber Code perfidy prohibitions

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[72] Study of Lieber's work apart from the Code suggests he intended his work to leave room for considerations of morality in the operation of the law of war. Childress, *supra* note 59, at 36.

[73] Lieber Code, *supra* note 59, art. 15.

[74] *Id.* arts. 63, 65, 117; *see also* Childress, *supra* note 59, at 50–51 (identifying Articles 63, 65, and 117 as indicative of the bounds of Lieber's conception of perfidy).

may more closely resemble codified general principles than specific prohibitions of perfidy.

Law-of-war commentary labels the entire Code in similarly general terms. A Lieber historian has argued the Code is misunderstood as purely a work of legal positivism. Childress argues Lieber's justifications for rules "resulted in part from his conviction that legal positivism in international law is inadequate."[75] He notes that Lieber understood and expressed in his Code a unity between law and morality.[76] Informed by then-prevailing notions of morality, Lieber's perfidy provisions might have appeared clearer and less vague to his military contemporaries.

Other influential military jurists of the period shared Lieber's roomy view of perfidy. In his widely respected treatise on international law, General Halleck expressed the distinction between honorable means of warfare and perfidy in moral rather than legal or technical terms. Halleck observed,

> *Whenever* we have expressly or tacitly engaged to speak the truth to an enemy, it would be perfidy in use to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error, either by words or actions . . . it is the breach of good faith, express or implied, which constitutes the perfidy, and gives to such acts the character of lies.[77]

2. 1874 Brussels Declaration and 1880 Oxford Manual

Inspired by the Lieber Code, a series of multilateral law-of-war instruments soon emerged, each addressing perfidy. Two un-adopted, though later influential efforts, the 1874 Brussels Declaration and the

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[75] Childress, *supra* note 59, at 40. *See also* Burris Carnahan, *The Civil War Origins of the Modern Rules of War: Francis Lieber and Lincoln's General Order No. 100*, 39 N. KY. L. REV. 661, 673–74 (2012) (characterizing Lieber's work as positivist and empirical in methodology yet natural law-based in substance).

[76] Childress, *supra* note 59, at 36.

[77] 1 HALLECK, *supra* note 64, § 16 (emphasis added). Halleck cites to an impressive collection of early law-of-war treatises to support his expression of perfidy. *Id*.

1880 Oxford Manual, included specific provisions prohibiting perfidy and treachery in combat.[78] Although each was deeply influenced by its American predecessor, one finds in the Brussels Declaration and Oxford Manual evolutionary departures from Lieber's formula. The departures of each proved later to be persistent features of twentieth century perfidy rules. In particular, both the Declaration and Manual introduced a degree of specificity to the perfidy prohibition not found in the Lieber Code, marking an important preliminary move from general principle to specific prohibition. Where Lieber drafted an immensely open-textured perfidy rule, the authors of the Brussels Declaration and Oxford Manual were far more selective with their prohibitions.

The 1874 Brussels Declaration famously prefaced its enumerated prohibitions on means of injuring enemies with the following fundamental law-of-war principle:

> The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.[79]

The succeeding article then enumerates a series of specific prohibitions evidently intended to discharge the notion of limited warfare. Two enumerated prohibitions relate directly to perfidy and treachery. They are "murder by treachery of individuals belonging to the hostile nation or army" and "improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention."[80] Late nineteenth century readers may have appreciated the Declaration's preceding prohibitions on "employment of poison or poisoned weapons" and on "improper use of a flag of truce or . . . uniform of the enemy" as a corollaries to perfidy or treachery as well.[81] These examples would have been clearer than

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[78] Final Protocol, Signed at Brussels, Project of an International Declaration Concerning the Laws and Customs of War, art. 13(b), Aug. 27, 1874, *reproduced in* Schindler & Toman, *supra* note 37, at 21 [hereinafter Brussels Declaration]; INST. OF INT'L LAW, THE LAWS OF WAR ON LAND (OXFORD MANUAL) (Sept. 9, 1880), *reproduced in* Schindler & Toman, *supra* note 37, at 29 [hereinafter OXFORD MANUAL].

[79] Brussels Declaration, *supra* note 78, art. 12.

[80] *Id.* art. 13.

[81] Grotius regarded killing by poison as contrary to custom though he included no specific reference to treachery or perfidy. HUGO GROTIUS, 2 DE JURE BELLI AC PACIS, bk. III, ch. IV, § 15, at 651 (Francis W. Kelsey trans., 1925) (1625). Ancient Asian codes of conduct in war did associate the use of poison with treachery. *See* W. S. Armour, *Customs of Warfare in Ancient India*, 8 THE GROTIUS SOCIETY: PROBLEMS OF PUBLIC

Lieber's work, offering somewhat greater specificity. Still, the Declaration's examples fall short of a technical definition of treachery. The Declaration's greatest contribution was its influence on succeeding efforts to codify the law of war.

Appearing just six years later, the 1880 Oxford Manual provided more deliberate treatment of perfidious conduct. In fact, perfidy appears in the Manual's opening section on General Principles. Clearly drawing on the Brussels Declaration, Article 4 of the Oxford Manual states,

> The laws of war do not recognize in belligerents an unlimited liberty as to the means of injuring the enemy. They are to abstain especially from all needless severity, as well as from all perfidious, unjust, or tyrannical acts.[82]

Standing alone, the Manual's reference to perfidy offers little in terms of practical regulation and, like its predecessors, offers no technical definition. Perhaps, like the Lieber Code's intended U.S. audience, military commanders of the late-nineteenth century were adequately steeped in custom to identify perfidious acts without more. And perhaps States were unwilling to cede any further prerogative to the international legal system. The greatest significance of the provision may merely be its juxtaposition with one of the most fundamental and widely accepted expressions of law-of-war principles—the newly acknowledged international legal limit on resort to means of injuring enemies.

The Oxford Manual's more pragmatic and specific contributions to the prohibition of perfidy are found in a subsequent section addressing "Means of Injuring the Enemy." Here, the Manual enhances its general prohibition on perfidy with a series specific prohibitions related to honorable warfare. Indeed, the preamble to the section begins, "As the struggle must be *honourable* (Article 4) . . . ."[83] Four enumerated prohibitions follow, including "To make use of poison . . . ; [T]reacherous attempts upon the life of an enemy; as, for example, by keeping assassins in pay or by feigning surrender; To attack an enemy

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AND PRIVATE INTERNATIONAL LAW 71, 73 (1922). Armour remarks, "The discovery that [poisoned weapons] were not fitting for honourable warriors was a great one. 'They who without turning their back on their enemies are killed in battle . . . go to heaven if they do not use treacherous weapons.'" *Id.*

[82] OXFORD MANUAL, *supra* note 78, art. 4.

[83] *Id.* pt. II (b), pmbl. (emphasis added).

while concealing the distinctive signs of an armed force . . . ," and finally, a reproduction of the Brussels Declaration provision on misuse of enemy flags and uniforms and internationally protected emblems.[84]

More than mere illustrations, the Oxford Manual's specific prohibitions seem to mark an important evolution in perfidy doctrine. While the 1874 Brussels Declaration had previously enumerated treacherous murder and misuse of emblems, the Oxford Manual's addition of assassination, feigning surrender, and conducting attack out of uniform as examples of prohibited conduct clarifies that understandings of perfidy, treachery, and honorable conduct in war are premised on an assumption of good faith between belligerents. The Oxford Manual makes plain what uncodified custom, the Lieber Code, and the Brussels Declaration did not; that humane and lawful warfare requires that enemies possess a modicum of trust in one another. At a minimum, enemies must be assured that honoring law-of-war rights and duties of humanity will not result in tactical or operational disadvantage.

The 1874 Brussels Declaration and Oxford Manual's move from the general to the specific was not without cost. As with the Brussels Declaration, States were concerned that drafters had put too fine a point on some rules. Perceived legal innovations on the part of the Brussels Declaration drafters provoked reluctance and skepticism on the part of Great Britain especially, which did not participate in its drafting, signed nonetheless, but then led efforts to discourage ratification.[85] The British indictment is curious given the distinctly military character of the

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[84] *Id.* art. 8.

[85] PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS 108–09 (1908); 1 HALLECK, *supra* note 64, at 554. Updating General Halleck's treatise, Sherston related the British representative's assessment of the Brussels Declaration:

> When the more important articles of the Project came to be examined and discussed, instead of mere rules for the guidance of military commanders based upon usage, upon which a general understanding could be show to be desirable in the interests of humanity, the articles were seen to contain or imply numerous innovations, for which no practical necessity was proved to exist, and the result of which would have been greatly to the advantage of Powers having large armies, constantly prepared for war, and systems of compulsory military service.

Id.

commission that produced the Declaration.[86] Defending the Declaration twenty-five years later, a Russian representative observed it was not "an international scientific code, but . . . a common basis for all the instructions which the Governments are to give to their armies and which shall be binding in time of war."[87]

Still, the Manual's failure to attract widespread adoption does not appear to have been based on its treatment of perfidy or treachery. Nor does any other substantive rule expressed in the Oxford Manual appear to have been particularly objectionable. Rather, European militaries seem to have been fundamentally skeptical of committing the rules and customs they had previously entrusted to internal military codes and martial manuals, and above all to military sensibilities to international legal codification.[88] Following publication of the Oxford Manual, German Field Marshal von Moltke offered his support for the goal of "softening of manners" in war but remarked, humanity "would not be attained by means of a codification of the law of war."[89] Lacking a third-

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[86] "[A]mong 32 members of the Conference, 18 were military men, 10 were diplomats and 4 were legal experts and senior officials with no connection to the military and diplomatic professions." Henri Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering*, 299 INT'L REV. RED CROSS 98, 100 (1994) (quoting G. Rolin-Jaequemyns, *Chronique du Droit International 1871–1878*, VII REVUE DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPAREÉ 90–91 (1875)).

[87] THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 475 (James Brown Scott ed., 1920) [1899 HAGUE CONFERENCE PROCEEDINGS].

[88] Many European powers ratified the 1868 St. Petersburg Declaration during this period. 1868 Saint Petersburg Declaration, *supra* note 38, *in* Schindler & Toman, *supra* note 37, at 93 (listing signatories of 1868). However, unlike the Oxford Manual and the Brussels Declaration before it, the St. Petersburg Declaration did not regulate war in any comprehensive fashion. The 1868 Declaration addressed only the narrow issue of prohibiting certain projectiles. Yet the Declaration's preamble did highlight overarching observations on humanity in war. In fact, some regard the 1868 Declaration's true importance to lie in its preamble rather than its substantive provisions. Meyrowitz, *supra* note 86, at 99.

[89] BORDWELL, *supra* note 85, at 114–15 (quoting Letter from Count Helmut von Moltke, to Dr. Johan Bluntschli, *in* 13 REVUE DE DROIT INTERNATIONAL 80–82 (1881)). It is worth noting that codified law-of-war rules were not alone in attracting the ire of prominent military professionals. Law-of-war custom also inspired well-heeled resistance. The seminal Prussian strategist Carl von Clausewitz wryly observed, "War is an act of force to compel our enemy to do our will . . . [A]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, know as international law and custom, but they scarcely weaken it." CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret trans., eds., 1976) (1832).

party enforcement mechanism, von Moltke observed the Manual would do nothing to curb infractions in war.[90]

All the same, despite their inchoate adoption, the 1874 Brussels Declaration and 1880 Oxford Manual reflect an important developmental moment in law-of-war treatment of perfidy. Separately, each confirms the perfidy prohibition's place as a central tenet of the law regulating the conduct of hostilities, as well as the prohibition's roots in traditions of honorable, even chivalrous, warfare. Together, they signal an early effort to evolve perfidy from generally prohibited conduct to a specific and technically proscribed method of warfare. These early and specific treatments would be mimicked to varying degrees by succeeding law-of-war instruments of the twentieth century.

C. The Hague Regulations

The first international assembly not convened to conclude a war in progress,[91] the 1899 Hague Peace Conferences produced the first multilateral treaty to regulate the conduct of hostilities on land comprehensively.[92] Inspired by the Conferences' success and mood, States soon reconvened a second round of meetings in 1907. The 1907 Hague Conferences produced a broader assortment of conventions. Yet with respect to the regulation of the conduct of hostilities on land, the 1907 Conferences largely reproduced the text of the 1899 Hague Convention II.[93] Thus the negotiations and preparatory work of the 1899 Conference provide the greatest insight to the formation of the Hague Conventions on the conduct of hostilities and their treatment of perfidy and treachery in particular.

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[90] BORDWELL, *supra* note 85, at 114.

[91] 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at v. The proceedings of the Conferences appeared much earlier in Dutch and French language summations. *Id.*

[92] *See* 1899 Hague Convention (II) Respecting the Laws and Customs of War on Land with Annex of Regulations, July 29, 1899, 32 Stat. 1803, 1 Bevans 247 [hereinafter 1899 Hague Convention II]. Until the Hague Convention (II) of 1899 entered force, multilateral law-of-war treaties had either failed to secure ratification or addressed only very specific topics of the regulation of conduct of hostilities. ROBERTS & GUELFF, *supra* note 37, at 67.

[93] Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277 [hereinafter 1907 Hague Convention IV].

1. Significance of Hague Regulations

It is difficult to overstate the *symbolic* significance of the Hague Regulations to legal restraint in twentieth century combat. Much like the 1949 Geneva Conventions today, the Regulations were synonymous with the law of war during the early and mid-twentieth century.[94] Yet to say the Regulations profoundly or even meaningfully altered *actual* conduct in war may be giving them too much, or rather the wrong kind, of credit.[95] The Hague Convention's *si omnes* clause restricted its operation to armed conflicts between States Parties to the Convention, limiting the material application of its land warfare regulations.[96] However, the

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[94] Adam Roberts, *Land Warfare from Hague to Nuremberg*, *in* Howard et al., *supra* note 2, at 134 (describing Nuremberg Tribunal's transformation of Hague Regulations into customary international law despite the Regulations' innovations and expansions of law-of-war custom).

[95] Telford Taylor, a U.S. prosecutor at the post-World War II Nuremburg International Military Tribunal observed, "Many of the provisions of the 1907 Hague Conventions regarding unlawful means of combat . . . were antiquarian. Others had been observed only partially during the First World War and almost completely disregarded during the Second World War . . . ." Tami Davis Biddle, *Air Power*, *in* Howard et al., *supra* note 2, at 155. Geoffrey Best argues the Regulations' had minimal influence on military thinking prior to World War I. GEOFFREY BEST, LAW AND WAR SINCE 1945, at 46 (1997) (citing Gerald I. A. D. Draper, *Implementation of International Law in Armed Conflicts*, 48 INT'L AFF. 46, 55–56 (1972)). As for the Regulations' post-WWI performance, Best classifies them primarily as "opportunities to showcase how the enemy had treacherously reneged on only recent promises." BEST, *supra*, at 47.

[96] Article 2 of the 1907 Hague Conventions states, "The provisions contained in the Regulations referred to in Article 1 as well as in the present Convention do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention." *See, e.g.*, A.W.G. Raath & H.A. Styrdom, *The Hague Conventions and the Anglo-Boer War*, 24 S. AFR. Y.B. INT'L L. 149 (1999) (noting British reliance on the 1899 Hague Second Convention *si omnes* clause to preclude operation of the Regulations in the Second Boer War). Raath and Styrdom note that in addition to the *si omnes* clause, racial prejudices and attitudes toward non-European fighters also limited the Regulations' influence on combat.

> For example, in February 1900, Field Marshal Lord Wolseley, commander-in-chief at the British War Office, availed himself of the nebulous concept of 'civilised nations' to subvert the binding force of the laws and customs of war in the following terms:
>
> I know the Boers of all classes to be most untruthful in all their dealings with us and even amongst themselves. They are very cunning, a characteristic common to all untruthful races . . . . To attempt to tie our hands in any way, no matter how small, by the 'Laws and Customs of War' proposed for *Civilized* nations at the

Convention's and its annexed Regulations' position as a symbolic inroad to sovereignty and as the bedrock of later international legal instruments is indisputable. The Hague Regulations attracted widespread ratification by developed States,[97] were nearly the exclusive treaty-based source of comprehensive land combat regulation during two World Wars,[98] and were ultimately determined to reflect custom in their entirety.[99] At the end of the Second World War, they formed the primary legal basis for war crimes convictions at the Nuremburg and Tokyo international military tribunals.[100]

> Peace Conference, would be in my opinion suicidal, for the Boers would not be bound by any such amenities.

Id. at 156 (citing War Office 32/850 Wolseley, to Parliamentary Under-Secretary (Feb. 14, 1900), *quoted in* S.B. SPIES, METHODS OF BARBARISM: ROBERTS AND KITCHENER AND CIVILIANS IN THE BOER REPUBLICS, JANUARY 1900–MAY 1902, at 311 (1978)).

[97] Schindler & Toman, *supra* note 37, at 85–86 (indicating original States signatory and those later acceding to Hague Convention IV and Regulations).

[98] The Geneva Conventions that operated during the First and Second World Wars respectively remained narrow and discrete regulations for the treatment of only the wounded with respect to the former conflict and the wounded and prisoners of war with respect to the latter. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 6, 1906, 35 Stat. 1885, T.S. No. 464; Convention for the Amelioration of the Condition of the Wounded and the Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. Neither offered significant coverage of belligerent occupation, protection of civilians, or conduct of hostilities generally.

[99] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 77 (July 8) [hereinafter ICJ Nuclear Weapon Opinion]; *see also* Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 86 (July 9); U.N. Secretary-General, *Report of the Secretary General on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. S/25704 (May 3, 1993).

[100] 1 TRIAL OF THE MAJOR WAR CRIMINALS, 14 NOVEMBER 1945–1 OCTOBER 1946, NUREMBERG 254 (1947). The United Nations General Assembly has also expressed the view that the Hague Regulations reflect customary international law. G.A. Res. 95 (I), at 188, U.N. Doc. A/236 (Dec. 11, 1946). The conclusion that the Regulations reflected custom was, in fact, a finding of critical importance to the convictions at the International Military Tribunal (IMT) at Nuremberg. The base treaty of the Regulations prevented their operation during any armed conflict that involved a non-party to the Conventions. *See* 1899 Hague Convention II, *supra* note 92, art. 2. The Convention states, "The provisions contained in the Regulations . . . are only binding on the Contracting Powers, in case of war between two or more of them. These provisions shall cease to be binding from the time . . . a non-Contracting Power joins one of the belligerents." *Id.* Finding the Regulations to reflect custom permitted the IMT to apply their provisions to conduct during the Second World War notwithstanding the participation of States not party to the Regulations such as Bulgaria, Greece, Italy and Yugoslavia. Earlier, First World War

2. Hague Regulations on Perfidy

The Hague Regulations' treatments of perfidy and treachery are found in two adjacent articles addressing hostilities generally. First, Article 22 repeats the Brussels and Oxford instruments' fundamental principle concerning the limited means and methods of war. Article 22 states, "The right of belligerents to adopt means of injuring the enemy is not unlimited."[101] Second, taking a cue from the Oxford Manual, Article 23 lists methods of war "especially forbidden" including "to employ poison . . . to kill or wound treacherously individuals belonging to the hostile nation or army," and "to make improper use of a flag of truce, of the national flag or the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention."[102]

Considering the groundwork laid by the Lieber Code, the Brussels Declaration, and the Oxford Manual, the Hague Regulations' treatment of perfidy seems a relative retreat to generality.[103] While the Regulations retained their predecessors' references to poison and misuse of enemy and legally-protected emblems, the Hague drafters declined to adopt the Oxford Manual reference to "honourable"[104] warfare. Also missing are the Manual and the Lieber Code references to assassination and feigning surrender as examples of treachery.

The relative generality of the Regulations' treatment of perfidy is difficult to explain. By way of mandate, the Regulations' drafters enjoyed far greater liberty to legislate than two of their predecessors. Professor Lieber was charged merely to codify custom. Similarly, the preface of the Oxford Manual made clear the authors' choice not to innovate but merely to codify accepted ideas and customs.[105] By

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belligerents rejected operation of the Regulations on the basis of opposing State Parties' allies' failure to ratify or accede. COLEMAN PHILLIPSON, INTERNATIONAL LAW AND THE GREAT WAR 175 (1915).

[101] 1907 Hague Convention IV, *supra* note 93, art. 22.

[102] *Id.* art. 23.

[103] In fact, it appears a sub-commission of the First Hague Conference produced the initial drafts of the Regulations almost entirely from the 1874 Brussels Declaration. *See* 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 415–16. The record of proceedings provides a helpful side-by-side reproduction of the texts of the Declaration and the Regulations. *Id.* at 564–78.

[104] *See supra* note 83 and accompanying text.

[105] The delegates considered the work of the Oxford Manual in discussions of other provisions of the Regulations, such as belligerent occupation. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 510–11.

contrast, the Hague Regulations, like the Brussels Declaration before,[106] included the goal not only to codify custom but also to "revise the general laws and customs of war."[107]

Yet given a generously permissive drafting mandate, as well as the opportunity to reflect on and revisit their previous work from the First 1899 Conference, the authors of the 1907 Second Hague Conference made no change to their original treatment of perfidy and treachery, nor any substantive change to the work of preceding law-of-war instruments. Substitution of the phrase "To kill or wound treacherously" for the phrase "Murder by treachery" was the Regulations' only modification to the perfidy and treachery provisions of the Brussels Declaration.[108]

The best available explanation for this stasis or even regression is that international politics and delegates' egos had a hand in the Regulations' failure to advance or develop codification of the perfidy prohibition. The Record of Proceedings of the 1899 Hague Conference portrays a struggle of sorts between the representatives of Great Britain and Russia over the legacy of the 1874 Brussels Declaration. From diplomatic records, it seems British representatives were eager to preserve the effect of their decision decades earlier not to support the Declaration.[109] Reluctance to overreach custom or over-commit matters traditionally reserved to military prerogative to international law pervades the British representatives' comments.

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[106] Brussels Declaration, *supra* note 78, pmbl.

[107] 1907 Hague Convention IV, *supra* note 93, pmbl.; 1899 Hague Convention II, *supra* note 92, pmbl.

[108] A Danish delegate proposed the change in the meeting of a sub-commission, thinking "murder" to have been used incorrectly by the Brussels Declaration. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 491. The subcommittee added reference to wounding later at the behest of a French delegate. *Id.* at 557.

[109] *See id.* at 416–17. At an early meeting of the commission responsible for rules of land warfare, General John Ardagh observed,

> Without seeking to know the motives to which may be attributed the non-adoption of the Brussels Declaration, it is permissible to suppose that the same difficulties may arise at the conclusion of our labors at The Hague. In order to brush them aside and to escape the unfruitful results of the Brussels conference . . . we would better accept the Declaration only as a general basis for instructions to our troops on the laws and customs of war . . . .

Id. General Ardagh repeated his position later in the Conferences. *Id.* at 517.

Meanwhile Russian representatives, through the forceful and tireless efforts of their formidable delegate Fyodor Fyodorovich Martens, approached the 1899 Conference as a chance to give legal effect to former, failed efforts to codify the law-of-war.[110] It is clear throughout the Record that Russia, through Martens, viewed the *jus in bello* proceedings of the 1899 Hague Conference simply as a second opportunity to win approval of the Brussels Declaration. A brilliant, persuasive diplomat and drafter, Martens ultimately managed both to establish the 1874 Declaration as the starting point for discussion of the regulation of land warfare at the Conference and also to preserve the majority of its substantive provisions in the various committee and plenary proceedings.[111]

The immediate effect of Martens' efforts was the world's first comprehensive *jus in bello* treaty. The collateral effect for the perfidy prohibition, and perhaps other nascent law-of-war codifications, was a degree of doctrinal stagnation. One finds in the Hague Regulations not a perfidy prohibition revised and updated to reflect notions of modern sensibility in war, but rather a nearly rote reproduction of mid-to-late nineteenth century, embryonic Positivism. The Conferences included no effort to clarify the perfidy prohibition. No delegation proposed adding a more specific articulation, formulating a definition, or identifying additional examples or specific prohibitions of perfidious means or methods. In fact, evidence of skepticism toward such an effort can be found in at least one national report on the Conferences. The U.S. delegation to the 1899 Hague Conference argued, "the reproach of cruelty and perfidy, addressed against [poison gas] shells, was equally uttered formerly against firearms and torpedoes, both of which are now employed without scruple."[112]

One does find in the Record, however, confirmation that delegates regarded the Regulations' enumeration of examples of perfidy to be non-

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[110] *See id.* at 417, 505–07, 518.

[111] *Id.* at 383, 415. *See* Vladimir Pustogarov, *Fyodor Fyodorovich Martens (1845–1909): A Humanist of Modern Times*, 36 INT'L REV. RED CROSS 300 (1996).

[112] *Report of Captain Mahan to the United States Commission to the International Conference at the Hague, on Disarmament, etc., with Reference to Navies*, *in* 2 THE HAGUE PEACE CONFERENCES 37 (1909). Otherwise, the U.S. report on the 1899 Conferences made no comments on the Regulations treatment of prohibited perfidy and treachery. *See Report of Captain Crozier to the American Delegation to the First Hague Conference, Regarding the Work of the Second Subcommittee of the Second Committee of the Conference*, *in* 2 THE HAGUE PEACE CONFERENCES 45 (1909).

exhaustive. In particular, the Regulations' reference to methods "especially forbidden" made clear that other forms of treachery may have been prohibited as well (just not "especially").[113] As an example, to be codified by treaty sixty years later, a French delegate to the Convention observed, "making [a person] prisoner by treachery is likewise prohibited."[114]

3. Summary of Early Codifications

Between the late-nineteenth and early-twentieth century, States attempted several codifications of the perfidy prohibition. In one sense, these early efforts reflected an evolution beyond un-codified custom and vague principle. In particular, a number of legal instruments included examples of perfidious conduct in hostilities. Overall, however, early codifications of perfidy seem to have been part of larger efforts directed at securing general commitments to instruct armies on law-of-war topics and principles rather than endeavors to advance or secure the doctrinal clarity needed to support individual criminal enforcement. No international or domestic instrument of the period offered a technical definition of perfidy or treachery. Application and enforcement of these early prohibitions of perfidy required deep familiarity with military professional custom, a developed sense of battlefield morality and ethics, a high degree of tolerance for subjective variation, and a strong dose of context.[115]

All the same, change was not far off. Legal academics and commentators soon saw fit to expand and clarify the Hague perfidy and treachery formulas. Shortly after the 1907 Hague Regulations' entry into force, the influential law-of-war commentator J. M. Spaight defined treachery as follows:

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[113] 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 557.

[114] *Id.*

[115] Law-of-war commentators have remarked on the apparent selectivity and subjective application of the early *jus in bello*. BEST, *supra* note 95, at 22 (1997); Michael Howard, *Constraints on Warfare*, *in* Howard et al., *supra* note 2, at 3. In many instances, the early law of war was reserved for peer competitors, a synallagmatic contract rather a universal code. BALTHAZAR AYALA, 2 THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE (John P. Bate trans., 1912) (1582) (excluding pirates, brigands, and rebels from the category of enemy and therefor from law-of-war protecting and general protection from breaches of good faith); Harold Selesky, *Colonial America*, *in* Howard et al., *supra* note 2, at 59.

> It is the essence of treachery that the offender assumes a false character by which he deceives his enemy and thereby is able to effect a hostile act which, had he come under his true colours, he could not have done. He takes advantage of his enemy's reliance on his honour.[116]

Spaight's formulation, including his expression of forbearance and detrimental reliance on the part of the deceived victim, would prove highly influential. However, incorporation of Spaight's element-based definition into treaty form would not come for nearly six decades.

As a result, misunderstanding and error concerning perfidy reigned for a time at international tribunals, particularly at the Tokyo International Military Tribunal. Among charges against Japanese leadership was violation of the 1907 Hague Regulations Article 23(b) prohibition on treacherous attack. The prosecutor argued, "An attack without warning on another nation with which Japan was at peace constituted treachery of the worst type, and under the provisions of the Hague Convention the killing of any human being during such attack became murder."[117]

The prosecutor's error in conflating violations of the *jus ad bellum* and the *jus in bello* evaded even the Tribunal members. The judges found fault not in the prosecutor's application of the Hague Regulations to a strategic decision whether to resort to force at all but rather in the argument that the Pearl Harbor attack was a violation any particular confidence or trust.[118] The Tribunal opined that, given preexisting tension in the Pacific, the United States should have been on notice of the possibility of Japanese invasion, thus vitiating illegal treachery.[119] As Boister and Cryer state well, the entire Tribunal seems to have confused common notions of political betrayal with legal notions of treachery.[120]

It seems early and mid-twentieth century treatments of perfidy remained expressions at the level of generality expected of a principle rather than specific prohibitions.

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[116] JAMES MOLONY SPAIGHT, WAR RIGHTS ON LAND 87 (1911).
[117] NEIL BOISTER & ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 171 (2008) (citing Transcript at 327).
[118] *Id.*
[119] *Id.*
[120] *Id.* at 172.

D. 1977 Additional Protocol I

It is, in a sense, surprising that none of the four 1949 Geneva Conventions addresses perfidy directly—and that none of the Conventions' early predecessors does either. On closer consideration, however, the omission proves consistent with the Geneva Conventions' longstanding, exclusive focus on treatment of persons in enemy custody. For over a century, the Geneva tradition of regulating warfare restricted itself to prescribing treatment standards applicable to persons under the control of an enemy belligerent—so called victims of war.[121] Thus, the Geneva Conventions left regulation of targeting and the conduct of hostilities, and therefore perfidy, almost entirely to treaties and instruments of the Hague tradition.

But beginning in 1956, the International Committee of the Red Cross (ICRC) proposed to address actual conditions of combat as part of the Committee's mission to develop the law of war generally.[122] The ICRC and others noted the relative dormancy of the Hague tradition in developing and updating rules applicable to the use of weapons.[123] Additionally, radical changes in the nature of warfare, especially aerial bombardment and the range of persons participating in hostilities, bolstered calls to update the *jus in bello*.[124] In 1977, perfidy and rules for targeting operations finally found their way into the Geneva

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[121] Treaties identified with the Hague tradition did not reciprocate the Geneva tradition's forbearance. For instance, the 1899 and 1907 Hague Regulations include provisions concerning the treatment and capture of prisoners of war. 1899 Hague Convention II, *supra* note 92, ch. II; 1907 Hague Convention IV, *supra* note 93, ch. II. *See also* discussion *supra* text accompanying note 35.

[122] The ICRC proposed its Draft Rules for the conduct of hostilities at its XIXth International Conference in New Delhi, India in 1957. Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War, 1956, *in* Schindler & Toman, *supra* note 37, at 339. The draft provoked little reaction from States, however a resolution at the following year's conference encouraged the ICRC "to pursue the development of International Humanitarian Law." *Id.* at xxix–xxx.

[123] INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at xxix (Yves Sandoz et al. eds, 1987) [hereinafter AP I COMMENTARY]. The ICRC notes coordination and agreement with the Government of the Netherlands, in its capacity as depositary of the Hague Conventions, concerning its expansion into topics of hostilities. *Id.*

[124] *See* George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 1 (1991); Guy Roberts, *The New Rules for Waging War: The Case Against Ratification of Additional Protocol I*, 26 VA. J. INT'L L. 109, 120–22 (1986).

Conventions' lineage, namely, through Additional Protocol I (AP I) to the 1949 Geneva Conventions.[125]

1. Additional Protocol I on Perfidy

At the time it entered force, AP I included the only treaty-based definition of perfidy. Article 37 states,

> It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.[126]

The most noticeable change from the Hague Regulations' formula is semantic. The protocol substitutes the term perfidy for treachery. There is some evidence that commentators had previously regarded the terms as synonymous.[127] At least two national law-of-war manuals still use the terms interchangeably.[128] Yet some law-of-war scholars detect a substantive distinction between the two terms.[129] Of those who appreciate a legal distinction, most consider that treachery still describes a broader class of dishonorably deceptive acts than perfidy.[130] On the other hand, an ICRC commentary to AP I claims States abandoned

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[125] *See generally* 1977 Additional Protocol I, *supra* note 41, pt. III, sec. I, pt. IV, sec. I.

[126] *Id.* art. 37, para. 1.

[127] Cowles, *supra* note 4, at 58. Colonel Cowles notes Spaight's earlier work on treachery, cited above, as equivalent to the expression of perfidy. *Id.* at 58 (citing SPAIGHT, *supra* note 116, at 87).

[128] UK MANUAL, *supra* note 56, ¶ 15.12.1 (noting "The definition of perfidy . . . may also be used as guidance as to the meaning of 'treachery' in internal armed conflicts,"); FM 27-10, *supra* note 56, ¶ 50.

[129] *See* Rain Liivoja, *Chivalry Without a Horse: Military Honor and the Modern Law of Armed Conflict*, *in* THE LAW OF ARMED CONFLICT: HISTORICAL AND CONTEMPORARY PERSPECTIVES 89 (Rain Liivoja & Andres Saumets eds, 2012) (suggesting that treachery involves moral obligations and "extra-legal concepts on what is proper and honourable in warfare"); Michael N. Schmitt, *State Sponsored Assassination in International Domestic Law*, 17 YALE J. INT'L L. 609, 617 (1992).

[130] Schmitt, *supra* note 129, at 617. Professor Schmitt observes, "Treachery, as construed by early scholars, is thus broader than the concept of perfidy; nevertheless, the same basic criteria that are used to distinguish lawful ruses from unlawful perfidies can be applied to determinations of treachery. *Id.*

"treachery" because the term was considered "too narrow."[131] A pair of commentators concurs with the ICRC, concluding that perfidy is the broader term, absorbing practices such as assassination not covered by treachery.[132] Some considered treachery, especially the French "*trahison*," to be an exclusively municipal term, inapplicable to behavior toward an international enemy.[133] As with so many facets of law-of-war perfidy, the question is probably best characterized as unsettled, at this point relegated to abstract semantics.

A second conspicuous change from the Hague formulation relates to the AP I consequences of perfidy. The Hague Regulations had only addressed wounding or killing by treachery, but AP I adds "capture" to killing and injury as effects sufficient to constitute prohibited perfidy.[134] State parties to AP I are now clearly prohibited from resorting to perfidy to accomplish captures. It is unclear whether capture now constitutes a sufficient effect to constitute perfidy under customary international law applicable to States not parties to AP I. Importantly, the Rome Statute of the International Criminal Court does *not* include capture among effects sufficient to establish the war crime of perfidy.[135] On the other hand, the ICRC has concluded that the addition of capture now reflects customary international law, binding on States not Parties to AP I.[136]

Where the Hague Regulations presented killing and injury as "especially forbidden" examples of perfidy, AP I appears to forbid or prohibit *only* those deceptions and violations of confidence that result in killing, injury, or capture. Deceitful, even bad faith claims to law-of-war protection leveraged to produce some other form of military advantage, short of casualties or capture of persons do not fall within AP I

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[131] AP I COMMENTARY, *supra* note 123, ¶ 1491.

[132] J. Nicholas Kendall, Note, *Israeli Counter-Terrorism: "Targeted Killings" Under International Law*, 80 N.C. L REV. 1069, 1075 (2002); Patricia Zengel, *Assassination and the Law of Armed Conflict*, 43 MERCER L. REV. 615, 622 (1992).

[133] AP I COMMENTARY, *supra* note 123, ¶ 1488. The commentary notes the concern with limits on the term *trahison* originated at the 1874 Brussels Declaration Conference. *Id.* (citing XXIst International Conference of the Red Cross, Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts, Report Submitted by the International Committee of the Red Cross in May 1969).

[134] Concern with perfidious or treacherous capture was not new, however. Recall that a French delegate had declared his government's understanding that Hague Regulations Article 23(b) also prohibited treacherous captures. 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 557.

[135] ICC Rome Statute, *supra* note 8, art. 8(2)(b)(xi), (e).

[136] ICRC CIL STUDY, *supra* note 15, at 225.

prohibited perfidy. Such acts may constitute "improper use" of insignia if conducted by resort to certain enumerated protected emblems such as UN emblems, uniforms of neutrals or enemies, or emblems of the Red Cross. But they are not regarded as prohibited perfidy by AP I.[137]

A highly influential commentary on AP I confirms that damage to property—specially protected or civilian objects and even military objects—does not fall within the Protocol's perfidy prohibition.[138] Therefore, AP I does not prohibit sabotage of military equipment or facilities by resort to otherwise perfidious means. Even sabotage resulting in immense military advantage secured by feigning a protected status does not qualify as prohibited perfidy under AP I. Such operations might run afoul of other rules, such as the rules against improper use of emblems, indiscriminate attack,[139] or the requirements of taking precautions in the attack.[140] Still, otherwise perfidious attacks that only damage objects are not within the Article 37 prohibition. The exclusion is especially curious given the Protocol's extensive regime of protection of civilian objects.[141]

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[137] 1977 Additional Protocol I, *supra* note 41, arts. 38–39. The Article 39(b) rule against using enemy uniforms is not accepted universally. While there is general consensus against using enemy uniforms while conducting attacks, the United States for instance, maintains enemy uniforms may be used to avoid detection during tactical movement or for information gathering. FM 27-10, *supra* note 56, ¶ 54 (observing, "In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse."). A draft U.S. military commission charge sheet perhaps calls into question the U.S. view, however. *See supra* text accompanying notes 26–27 (discussing Daqduq charge sheet). The United States did not include Article 37 among provisions it regards as either reflective of custom or supportable as custom through state practice in its most recent, though surely dated, official communication concerning AP I. McNeill Memorandum, *supra* note 57.

[138] MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 204 (1982). Bothe and Partsch served on the Additional Protocol diplomatic delegation of the Federal Republic of Germany. Solf, a lawyer with the U. S. Army, Office of the Judge Advocate General, served on the United States delegation to the conference.

[139] 1977 Additional Protocol I, *supra* note 41, arts. 48, 51.

[140] *Id.* art. 57.

[141] *See id*. arts. 48, 52. One of the chief goals of convening the 1974–1977 Diplomatic Conferences was to extend and develop protections for civilians and civilian objects from the effects of military targeting and attack. *See* AP I COMMENTARY, *supra* note 123, ¶¶ 2000–15. United Nations General Assembly support for the Additional Protocols also emphasized civilian protection. *See also* G.A. Res. 2675 (XXV), U.N. Doc. A/RES/2675 (Dec. 9, 1970) (Basic Principles for the Protection of Civilian Populations in Armed Conflicts).

Further AP I narrowing of the scope of perfidy coverage is evident from academic analysis. Influential commentators interpret the Protocol's perfidy prohibition to include a proximity requirement. Bothe, Partsch, and Solf contend an act of perfidy "must be the proximate cause of the killing, injury or capture. A remote causal connection will not suffice."[142] In other words, the physical consequences to a person must result immediately from the forbearance secured by feigned protected status. As a negative example, Bothe and his co-authors cite a lethal ambush arising from earlier, feigned injury as inadequate to establish prohibited perfidy.[143] Other important commentators concur, observing the deception and act of hostility must "constitute means of achieving one and the same object."[144] Only the unofficial ICRC commentary to AP I offers a contrary suggestion.[145]

Inchoate effects are seemingly also not within AP I prohibited perfidy. Commentators have observed that the killing, wounding, or capture requirements of prohibited perfidy do not include failed attempts at these effects.[146] The majority view holds that effects must actually be achieved to fall within the prohibition. The ICRC commentary notes the point as well.[147] Perhaps formalistic in the extreme, the conclusion is easily implied from the text of both AP I and Hague expressions. Given the decades of experience and the opportunity at the AP I conference to address the point, States seem to have declined to include attempts in the perfidy prohibition, holding fast to, and only augmenting with capture, the required effects of killing and wounding. The ICRC commentary notes hopefully that general rules of treaty interpretation might counsel a reading that prohibits attempts.[148] More realistically, however, it is very

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[142] BOTHE ET AL., *supra* note 138, at 204.

[143] *Id.*

[144] Dieter Fleck, *Ruses and Prohibition of Perfidy*, 13 MIL. L. & L. WAR REV. 269, 282–83 (1974).

[145] AP I COMMENTARY, *supra* note 123, ¶ 1492. The commentary portrays a situation involving perfidious conduct that merely results in delaying an enemy attack rather than killing, wounding or capture. The commentary observes that while initially the act would not violate the AP I prohibition, people would undoubtedly be killed in later combat. The commentary seems to suggest later casualties might suffice to constitute prohibited perfidy, though controversy on the point is admitted. *Id.*

[146] Matthew Morris, *"Hiding Amongst a Crowd" and the Illegality of Deceptive Lighting*, 54 NAVAL L. REV. 235 (2007) (noting "some question whether an *unsuccessful* attempt to kill the enemy through the use of false surrender is banned").

[147] AP I COMMENTARY, *supra* note 123, ¶ 1492.

[148] *Id.* ¶ 1493 (citing Vienna Convention, *supra* note 47, art. 53). Prosecutors with the U.S. military commissions appear to have adopted this view. Charges against Abd al

likely that theories of liability employed by international criminal law mechanisms and domestic implementations of the perfidy prohibition would reach inchoate acts.[149]

2. AP I's Required Elements for Perfidy

Lest one get the sense that AP I treatment of perfidy was entirely regressive, narrowing of the perfidy prohibition produced a degree of clarity lacking since the earliest codifications. The most valuable AP I refinement of perfidy was the addition of a definition of the term. Previous instruments had merely employed the term "treacherously" or simply referred to perfidy itself; many included illustrative examples or had identified conduct that was "especially forbidden."[150] But as previously illustrated, preexisting treatments of perfidy and treachery left a great deal to subjective interpretation or familiarity with military custom.[151]

By contrast, the second clause of Article 37 of AP I identifies three essential elements of perfidy. The elements are (1) an invitation of confidence that an adversary is entitled to protection; (2) an acceptance in that the target of intended perfidy exercises forbearance or accords the claimed protection; and (3) finally a betrayal of that confidence in bad faith with physically harmful human consequences.

A legal contractual analogy clarifies the AP I elements of perfidy. As defined in AP I, prohibited perfidy involves an offer, acceptance, breach, and damages.[152] The offer typically takes the form of an enemy invitation to accord protection. Like contract law, the offer may be verbal or implied by conditions surrounding the interaction such as by the attacker's outward appearance. Acceptance is expressed as forbearance or by a grant of protection. That is, in recognition and acceptance of the

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Hadi al-Iraqi include "Attempted Use of Treachery or Perfidy." Hadi Charge Sheet, *supra* note 23, at 10.

[149] *See* ICC Rome Statute, *supra* note 15, art. 25(f) (outlining individual responsibility on the basis of attempts at crimes).

[150] *See, e.g.*, 1907 Hague Convention IV, *supra* note 93, art. 23.

[151] *See supra* discussion accompanying notes 69–72.

[152] U.C.C. § 2-206 (1977). (describing elements of offer and acceptance in U.S. contract law). Thankfully, an understanding of perfidy requires no analysis of the concept of consideration in contracts. It seems the perfidy prohibition involves sufficient complexity as it is.

attacker's claimed protected status, the target refrains from attack. Rather than attack, the target affords the respect and protection owed to the law-of-war protected class falsely claimed by the attacker. Finally, breach occurs through that attacker's betrayal of the target's confidence that forbearance or protection was called for and produces damages in the form of killing, injury, or capture.

To clarify the contractual offer analogy, not every invitation of confidence lies within the scope of perfidy. To satisfy the AP I definition of perfidy, an invited confidence must be based on international legal protection derived from the law of war.[153] At the AP I Diplomatic Conference, States rejected in committee an ICRC proposal to apply the term "confidence" to include obligations of general international law and broader moral obligations.[154] The drafting committee determined that confidence "must be tied to something more precise and should not be tied to internal or domestic law."[155] Thus, for the purposes of perfidy, invitations of confidence or trust must match up with specific law-of-war protective provisions. For example, inviting an enemy to accord the protection owed to civilians,[156] the wounded and

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[153] 6 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 98, 100; 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 381.

[154] 14 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 264. Speaking on a draft article on perfidy a U.S. delegate observed, "In the English text, . . . the word 'confidence' seemed to relate that notion to a feeling of legal or moral obligation. Experience showed that there was no uniform standard of morality in the world in general, and still less in time of war." *Id.*

[155] A report from the Third Committee noted,

> The initial effort was directed toward finding an appropriate, general definition of perfidy. The key suggestion in this connexion [sic] came from [a] tripartite amendment, which proposed to define 'confidence' in terms of whether one was entitled to, or obliged to accord, protection under international law. The Committee agreed that confidence could not be an abstract confidence, but must be tied to something more precise and should not be tied to internal or domestic law. In the end, it was decided to refer to confidence in protection under 'international law applicable in armed conflicts', by which was meant the laws governing the conduct of armed conflict which were applicable to the conflict in question.

Id.

[156] *See* 1977 Additional Protocol I, *supra* note 41, arts. 48, 51 (stating "Parties to the conflict shall at all times distinguish between the civilian population and combatants . . . ," and "[t]he civilian population as such, as well as individual civilians, shall not be the

sick,[157] or to a prisoner of war[158] satisfies the offer element of AP I perfidy. On the other hand, feigning the status of a military journalist or an assistant to military religious personnel would not qualify because neither status entitles one to specific protection under the law of war. Similarly, States declined explicitly to include deceptive use of enemy uniforms, insignia, and emblems from the AP I treatment of perfidy. Additional Protocol I, like the Hague Regulations, treats misuse of enemy uniforms, along with those of neutral States, separately from perfidy.[159]

3. Categories of Perfidy under AP I

Perhaps the regrettable, though interpretively compelled, conclusion is that AP I identifies multiple versions or categories of perfidy. That is, Article 37 at once defines perfidy generally yet also identifies a specific, prohibited subclass of perfidy. A plain reading indicates that AP I prohibits only those acts of perfidy that result in killing, wounding, or capture. To be sure, the ICRC commentary to AP I strains against this understanding. Indeed, an overall sense of the ICRC's disappointment at the results of Article 37 runs throughout the commentary. Its overall treatment of Article 37 smacks of damage control. Indeed, the ICRC resorts to a wide range of international law arguments against the impression that AP I leaves a class of perfidy outside its prohibition—a class of permissible perfidy.[160]

Yet one struggles to find in Article 37 the textual ambiguity that traditionally occasions resort to broader means of interpretation.[161] A

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object of attack . . . ."); 1949 Geneva Convention IV, *supra* note 53, art. 27 (stating protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof . . . .").

[157] *See* 1949 Geneva Convention I, *supra* note 53, art. 12 (stating, "wounded or sick, shall be respected and protected in all circumstances . . . [a]ny attempts on their lives, or violence to their persons, shall be strictly prohibited.").

[158] *See id.* art. 13 (stating, "Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited.").

[159] 1977 Additional Protocol I, *supra* note 41, art. 39(b).

[160] AP I COMMENTARY, *supra* note 123, ¶¶ 1493–95.

[161] This is not to suggest that resort to teleological or functional interpretations or resort to a treaty's object and purpose are supplemental means of interpretation. Vienna Convention Article 31 appears to regard such ontological interpretive approaches as primary means of interpretation. Vienna Convention, *supra* note 47, art. 31(1); *see also*

report by the AP I committee responsible for addressing perfidy ultimately concluded Article 37 "does not prohibit perfidy, *per se*, but merely 'to kill, injure or capture an adversary by resort to perfidy.'"[162] Nor was it simply the case that the two-fold character of perfidy resulting from Article 37 escaped the attention of the delegates. An Indian delegate clearly highlighted the failure of Article 37 to prohibit perfidy *per se*.[163] He suggested unsuccessfully, "the principle should first be established that perfidy was unlawful, and that, consequently, 'it is forbidden to kill, injure or capture an adversary by resort to perfidy.'"[164]

Those yearning for a broader, arguably more humanitarian vision of prohibited perfidy might draw consolation from later provisions of AP I. In particular, Article 38 addresses specifically the misuse of important law-of-war protective emblems.[165] It does not include the requirements of killing, wounding, or capture found in prohibited perfidy, suggesting a broader prohibition. Yet States' deliberate narrowing of prohibited perfidy by AP I is plain.

Luigi Sbolci, *Supplementary Means of Interpretation*, *in* THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 147–49 (Enzo Cannizzaro ed., 2011) (elaborating supplemental means of treaty interpretation); MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 421–23 (2009) (outlining methods of treaty interpretation captured by Article 31 of the Vienna Convention). Yet an understanding of the object and purpose of the perfidy prohibition must surely be limited to the provision itself and not broader understandings of the object and purpose of restraints on warfare generally.

[162] 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 382.

[163] 14 *id.* at 268.

[164] *Id.*

[165] Article 38 states,

> 1. It is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other emblems, signs or signals provided for by the Conventions or by this Protocol. It is also prohibited to misuse deliberately in an armed conflict other internationally recognized protective emblems, signs or signals, including the flag of truce, and the protective emblem of cultural property.
>
> 2. It is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization.

1977 Additional Protocol I, *supra* note 41, art. 38.

4. AP I and Hague Regulations' Interplay over Perfidy

Despite its seemingly comprehensive treatment of the conduct of hostilities and targeting, it is important to recall that AP I does not regulate exclusively. In large part, the precise state of the codified perfidy prohibition may be a function of one's understanding of the relationship between AP I and the 1907 Hague Regulations. In general, AP I is understood to operate *alongside* rather than to displace or replace the Regulations. Judge Meron notes that, although AP I codifies a number of Hague rules, it "does not always state those rules fully, comprehensively or definitively."[166] The AP I preamble is worded somewhat ambiguously in this respect. The preamble recites the goal to "reaffirm and develop" existing law-of-war provisions, yet makes no reference to particular, pre-existing instruments.[167] Conference discussion and a vote at a plenary meeting of the AP I Diplomatic Conference clarify that a majority of States present included the Hague Regulations in the AP I mandate to reaffirm the preexisting law of war.[168] The ICRC commentary asserts as much as well.[169]

Still, a coherent theory of the relationship between the two treaties remains elusive. The AP I omission of examples cited in previous law-of-war instruments is notable. The Protocol abandons treatment of poison, which had previously been thought to be a treacherous means of combat. Like the Hague Regulations, AP I also declines to address assassination as part of perfidy or treacherous conduct. Omissions have led commentators to conclude that AP I's transition from the term "treachery" to "perfidy" absorbed the omitted examples, especially assassination.[170] A prominent study on assassination, however, dismisses this view as unlikely and inconsistent with early practice concerning treachery.[171] The ICRC commentary argues omission of previous examples was merely an effort to limit examples to those that attracted unanimous agreement.[172]

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[166] THEODOR MERON, WAR CRIMES LAW COMES OF AGE 271 (1998).
[167] 1977 Additional Protocol I, *supra* note 41, pmbl.
[168] 7 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 167–68.
[169] AP I COMMENTARY, *supra* note 123, ¶ 1488 ("[T]his Part does not aim to replace the Hague Regulations of 1907, but is concerned with developing them.").
[170] Kendall, *supra* note 132, at 1075; Zengel *supra* note 132, at 622.
[171] Schmitt, *supra* note 129, at 617.
[172] AP I COMMENTARY, *supra* note 123, ¶ 1503 (citing 15 OFFICIAL RECORDS OF 1994–1977 DIPLOMATIC CONFERENCE, *supra* note 45, at 382).

Overall, one finds inconsistent treatment of the provisions of the Hague Regulations in AP I. In some cases, States used AP I to restate Hague provisions. For instance, the AP I formulation prohibiting unnecessary suffering appears, in substance, nearly word-for-word from the Hague expression.[173] The Protocol also reproduces nearly verbatim the Brussels Declaration and Hague notions that means and methods of warfare are not unlimited.[174]

In other cases, however, AP I alters or omits important Hague provisions. That AP I would reproduce Hague provisions in some places, yet, as with perfidy, alter them in others leaves a somewhat troubling interpretive dilemma. Sound statutory interpretation would counsel giving legal effect to these differences, suggesting that restated provisions should be regarded as replaced and that omitted references in restated rules should be regarded as continuing in force. The Hague Regulations' perfidy provisions are firmly in the former class and thus a strong interpretive case can be made for their obsolescence.

5. *Consequences of AP I's Narrowing of Perfidy*

Finally, AP I narrowing of the perfidy prohibition was not limited to substantive treatment. Additional Protocol I's enforcement and implementation measures also confirm a narrowing of the notion of prohibited perfidy. Part V, Section II of AP I addresses "Repression of Breaches" through a system of enforcement measures that builds on the

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[173] 1977 Additional Protocol I, *supra* note 41, art. 35(2). Additional Protocol I states, "It is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." *Id.* The 1907 Hague Regulations state in relevant part, "it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering." 1907 Hague Convention IV, *supra* note 93, art. 23(e). Interestingly, the English translation of the 1899 Convention substitutes "of a nature to" in place of "calculated to." The 1907 English translation's alternation has suggested to some addition of a scienter element. *But see* M.G. Cowling, *The Relationship Between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict*, 25 S. AFR. Y.B. INT'L L. 131, 140 (2000) (discerning no practical difference between operation of the 1899 and 1907 statements of unnecessary suffering); Meyrowitz, *supra* note 86, at 102. However, no meaningful change appears in the French version, which States chose as the official text of both Hague Conventions.

[174] *Id.* art. 35(1).

grave breaches regime introduced by the 1949 Geneva Conventions.[175] The Protocol includes perfidy among six acts that constitute grave breaches when "committed wilfully . . . and causing death or serious injury to body or health . . . ."[176]

Unlike its five cohorts, perfidy is little affected by the grave breach death or serious injury requirement. Recall that AP I prohibited perfidy itself requires such consequences through Article 37. Instead, the grave breach provision's narrowing effect on AP I perfidy comes from the particular form of confidence invited. Article 85 describes only "the perfidious use, in violation of Article 37, of the distinctive emblem of the red cross, red crescent or red lion or of other protective signs recognized by the Conventions or the Protocol."[177] Thus only confidence invited with respect to a narrow collection of law-of-war protective emblems registers as a grave breach of AP I. Perfidious resort to civilian status or that of wounded and sick does not constitute a grave breach of AP I.

The practical consequences of these narrowed enforcement provisions are significant. Simple breaches, as opposed to grave breaches, of the perfidy prohibition carry no duty on the part of AP I State parties to enact domestic penal sanctions against perpetrators.[178] Nor do simple breaches of perfidy give rise under AP I and the Conventions' grave breaches regime to a duty on the part of State parties to search for perpetrators.[179] Similarly, State parties are not required by AP I to prosecute or extradite perpetrators of simple breaches of the

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[175] Geneva Convention I, *supra* note 53, arts. 49–51; Geneva Convention II, *supra* note 53, arts. 50-52; Geneva Convention III, *supra* note 53, arts. 129–31; Geneva Convention IV, *supra* note 53, arts. 146–48.

[176] 1977 Additional Protocol I, *supra* note 41, art. 85(3).

[177] *Id.* art. 85(3)(f).

[178] The obligation to enact penal sanctions for grave breaches appears identically in all four 1949 Geneva Conventions. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146. States Parties are not explicitly required by the grave breach system to enact penal sanctions for simple breaches. They are required merely "take measures necessary for suppression" of simple breaches. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146.

[179] The obligation to search for persons alleged to have committed grave breaches appears identically in all four 1949 Geneva Conventions. Geneva Convention I, *supra* note 53, art. 49; Geneva Convention II, *supra* note 53, art. 50; Geneva Convention III, *supra* note 53, art. 129; Geneva Convention IV, *supra* note 53, art. 146.

protocol under the principle of *aut dedere aut judicare*.[180] Perhaps most significantly, the system of universal jurisdiction, which is part of the grave breach regime, does not extend to simple breaches.[181] Therefore all the traditional minimums for domestic criminal jurisdiction including nationality or territoriality seemingly apply to incidents of non-grave perfidy. Finally, prosecutions of simple breaches of perfidy cannot rely on the severely negative gravitas that attends grave breaches of the Geneva Conventions and their protocols.

Ultimately, it seems the best understanding of the codified, law-of-war perfidy prohibition of AP I appreciates three varieties of perfidy: simple perfidy; prohibited perfidy; and grave perfidy. Simple perfidy includes all acts, regardless of consequences, that falsely invite an enemy to accord law-of-war protection and then betray that confidence in bad faith. Prohibited perfidy includes only perfidious acts that proximately result in death, injury, or capture of the betrayed enemy. And grave perfidy constitutes prohibited perfidy against a person protected by one of the four 1949 Geneva Conventions by false resort only to the protected emblems of the Red Cross.

If the effect of prior law-of-war treaties had been to shift perfidy gradually from broad custom into a specific prohibition, it is clear that AP I finished the job. The AP I provision on perfidy is a sharp conversion of the perfidy prohibition from broad principle into an expression of a specific prohibition. Through AP I, States appear finally to have dealt with perfidy squarely as a specific prohibition rather than as a mere sensibility of honorable conduct in war. Compared with its forebears, the AP I perfidy prohibition relies to a far lesser extent on the readers' familiarity with military custom and subjective notions of chivalry. But with codification and specificity came a critical narrowing

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[180] The obligation to bring to justice or extradite persons alleged to have committed grave breaches appears identically in all four Geneva Conventions. Geneva Convention I, *supra* note 53, arts. 49–51; Geneva Convention II, *supra* note 53, arts. 50–52; Geneva Convention III, *supra* note 53, arts. 129–31; Geneva Convention IV, *supra* note 53, arts. 146–48.

[181] The grave breaches regime of the 1949 Geneva Conventions, and by extension AP I, is widely recognized as an example of universal jurisdiction. States may prosecute grave breaches without any of the traditional sources of international jurisdiction such as nationality, territoriality, or passive personality. Joshua Ruby, *An Evolutionary Theory of Universal Jurisdiction*, 14 UCLA J. INT'L L. & FOR. AFF. 567, 584 (2009) (citing Willard B. Cowles, *Universality of Jurisdiction Over War Crimes*, 33 CAL. L. REV. 177, 217 (1945)); Antonio Cassese, *Is the Bell Tolling for Universality—A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 591 (2003).

of the prohibition. Following States' twentieth century narrowing of the perfidy prohibition through law-of-war treaties, what remains of the customs and principles codified by AP I and its forebears? Do broader principles concerning perfidy and treachery in war persist to limit the conduct of war in meaningful and relevant ways?

III. Perfidy and the Principle of Chivalry

Along with occasional judicial notice[182] and regular mention in military legal manuals,[183] treaty law makes clear that international custom and principles continue to operate in the modern law of war. Since the 1899 Hague Second Convention, nearly every significant law-of-war treaty has included, in either its preamble or operative sections, a version of the Martens Clause.[184] For example, the 1899 Hague Convention preamble states,

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. . . .[185]

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[182] Prosecutor v. Galić, Case No. IT-98-29-A, Judgement, ¶¶ 190–91 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (identifying principle of distinction); Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement, ¶¶ 109, 113 n.220, 157 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (describing customary duties of discrimination between combatants and civilians as well as military necessity); Prosecutor v. Galić, Case No. IT-98-29-T, Judgement and Opinion, ¶ 51 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003) (discussing the principle of military objective/necessity); ICJ Nuclear Weapon Opinion, *supra* note 99, ¶ 78 (identifying principle of distinction); United States v. List (The "Hostage Case"), 11 TRIALS OF WAR CRIMINALS BEFORE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 OCTOBER 1946–APRIL 1949, at 759, 1253–54 (U.S. Gov't Print. Office 1950) (discussing the principle of military necessity).

[183] *See supra* note 56 and accompanying text.

[184] *See, e.g.*, 1949 Geneva Convention I, *supra* note 53, art. 63; 1949 Geneva Convention II, *supra* note 53, art. 62; 1949 Geneva Convention III, *supra* note 53, art. 142; Geneva Convention IV, *supra* note 53, art. 158; 1977 Additional Protocol I, *supra* note 41, art. 1(2); 1980 Convention on Conventional Weapons, *supra* note 39, pmbl.

[185] 1899 Hague Convention II, *supra* note 92, pmbl.

Initially proposed by the influential Russian delegate Martens[186] to resolve debate over the rights of inhabitants of occupied territory to resist invading forces, the eponymous Martens Clause soon took on far greater significance.[187] The clause now stands both as a testament to the limits of States' agreement on codified rules and also as confirmation of their conviction that absence of treaty provisions does not give rise to lawlessness in war.

Although typically offered as an account of the continuing role of custom as a source of law-of-war obligations, the Martens Clause also illustrates the role of general law-of-war principles in regulating the conduct of hostilities.[188] The term "usages" calls to mind long-standing, law-of-war references to the "customs and usages" of war that predated major codifications.[189] Better yet, the clause's resort to "laws of humanity" tracks the widely acknowledged law-of-war principle of humanity.[190] The clause is perhaps the clearest indication that, despite their late nineteenth-century enthusiasm for codification, States envisioned a continuing role for unwritten custom and general law-of-war principles.

The law-of-war principle most frequently identified with a prohibition of perfidy and treachery is chivalry[191] or as it is sometimes

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[186] *See supra* notes 110–11 and accompanying text.

[187] 1899 HAGUE CONFERENCE PROCEEDINGS, *supra* note 87, at 547–48.

[188] IAN HENDERSON, THE CONTEMPORARY LAW OF TARGETING 29 (2009) (citing Antonio Cassese, *The Martens Clause: Half a Loaf or Simply a Pie in the Sky*, EUR. J. INT'L L. 187, 188 (2000)). Although he acknowledges critics, Henderson ultimately subscribes to an expansive view of the intended effect of the Martens Clause. Henderson notes the U.S. Military Tribunal at Nuremberg in the *Krupp* Case regarded the Clause "much more than a pious declaration." *Id.* (quoting United States of America v. Krupp von Bohlen und Halbach).

[189] *See* GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 41 (2010) (citing UK MANUAL, *supra* note 56, at 7).

[190] Williams v. Bruffy, 96 U.S. 176, 191 (1877); *In re* The Brig Amy Warwick, 67 U.S. (2 Black) 635, 667 (1862); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); UK MANUAL, *supra* note 56, ¶ 2.3; CANADIAN MANUAL, *supra* note 56, ¶ 202.1; GERMAN IHL MANUAL, *supra* note 56, ¶ 131; FM 27-10, *supra* note 56, ¶ 3; U.S. DRAFT MANUAL, *supra* note 56, ¶ 2.003.

[191] BOTHE ET AL., *supra* note 138, at 202 (asserting perfidy is "derived from the principle of chivalry"); Davis Brown, *Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict*, 47 HARV. INT'L L. J. 179, 203 (2006) (including perfidy in discussion of chivalry); *see also* CANADIAN MANUAL, *supra* note 56, ¶ 7 (stating, chivalry is reflected in specific prohibitions such as those against dishonourable or treacherous conduct and against misuse of enemy flags or flags of truce.").

expressed, honor. Chivalry is not unanimously recognized as a modern principle of the law of war. In fact, few modern sources include it at all. How or exactly when chivalry came to be omitted from mainstream articulations of the principles of the law of war is unclear.

The most notable proponents of a principle of chivalry are the Canadian Manual of the Law of Armed Conflict,[192] a 1956 U.S. legal manual on land warfare,[193] and a draft law-of-war manual recently circulated among U.S. government agencies.[194] Still, support is less than emphatic. The Canadian Manual concedes the chivalry principle's ambiguity immediately after announcing it. It observes, "The concept of chivalry is difficult to define. It refers to the conduct of armed conflict in accordance with certain recognized formalities and courtesies."[195] The Canadian Manual identifies none of these formalities or courtesies explicitly. Some academic commentators also include chivalry as a modern principle of the law of war.[196] Professor Wingfield, for instance, defines chivalry as, "the principle which forbids perfidy or treachery in military operations, while still permitting legitimate ruses of war."[197]

The concept of chivalry is more commonly associated with warfare of the Middle Ages.[198] Common notions of medieval warfare are bound up with romantic visions of courtesies scrupulously observed between

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[192] CANADIAN MANUAL, *supra* note 56, ¶ 202.7; U.S. DRAFT MANUAL, *supra* note 56, ch. II (citing honor among law-of-war basic principles). The Canadian Manual actually includes chivalry among three "primary concepts" reserving the term principles for three notions including: the Humanitarian Principle, the Principle of the Law of Geneva, and the Principle of the Law of War. CANADIAN MANUAL, *supra* note 56, ¶¶ 202–03.

[193] FM 27-10, *supra* note 56, ¶ 3. Though obviously dated, Field Manual 27-10 remains the U.S. Army's primary law-of-war manual. The manual includes no elaboration on the principle of chivalry beyond its initial enumeration among basic principles.

[194] U.S. DRAFT MANUAL, *supra* note 56, ¶ 2.006.

[195] CANADIAN MANUAL, *supra* note 56, ¶ 202.7.

[196] 2 LASSA OPPENHEIM, INTERNATIONAL LAW 226–27 (1944) (describing the principle of chivalry as introducing "a certain amount of fairness in offence and defence, and a certain mutual respect"); Peter J. Smyczek, *Regulating the Battlefield of the Future: The Legal Limitations on the Conduct of Psychological Operations (PSYOP) under Public International Law*, 57 A.F. L. REV. 209, 226 (2005) (citing LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 348 (2d ed. 2000)); Thomas C. Wingfield, *Chivalry and the Use of Force*, 32 U. TOL. L. REV. 111, 112 (2000) (citing Major Walter G. Sharp Sr., *The Effective Deterrence of Environmental Damage During Armed Conflict: A Case Analysis of the Persian Gulf War*, 137 MIL. L. REV. 1 31 (1992)); Gerald I. A. D. Draper, *The Interaction of Christianity and Chivalry in the Historical Development of the Law of War*, 5 INT'L REV. RED CROSS 3 (1965).

[197] Wingfield, *supra* note 196, at 112.

[198] Robert C. Stacey, *The Age of Chivalry*, *in* Howard et al., *supra* note 2, at 29–31.

belligerents. Yet even in that period, instances of feigned retreat (although there is generally no recognized legal duty to spare retreating forces)[199] and other seemingly dishonorable acts are found in accounts of Norman battles against English forces in the eleventh century as well as Mongol tactics of the period.[200] Worse, it was not at all unheard of for medieval combatants to resort to abject forms of perfidy. Accounts of outright perfidy include the English Tudors' desperate efforts to survive elimination by capturing the castle of Edward I at Conwy. Reduced to insufficient numbers to take the castle by force, the Tudors sent a carpenter who, when admitted to perform work, attacked the guards and opened the gates for a follow-on force.[201] Similarly, a historian recounts instances of knights entering a walled town, announcing themselves as allies, then slaughtering the defenders.[202]

The late Professor Colonel Gerald I. A. D. Draper counseled rejecting medieval chivalry as a source of the modern principle altogether. He observed chivalry of the age of Crusades is "not the area in which [a] positive contribution of chivalry to the story of restraints in warfare can properly be sought."[203] Rather than constitute a reliable or fundamental principle, chivalry seems often to have been merely an implied contract between an elite and homogenous class of combatants.

Thin enforcement of a chivalry principle extends to modern military practice as well. Research reveals no instances of international criminal enforcement of the principle. The nearest military criminal provision to chivalry may be a punitive article of the U.S. Uniform Code of Military Justice (UCMJ). General Article 134 of the UCMJ prohibits "all disorders and neglects to the prejudice of good order and discipline in the armed forces [and] all conduct of a nature to bring discredit upon the

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[199] *But see* Gabrielle Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 154–64 (2010). Blum argues for reconsideration of the principles of distinction and necessity to account for threat posed by enemy forces rather than mere status. *Id.*

[200] JON LATIMER, DECEPTION IN WAR 10 (2001) (citing CHARLES OMAN, 1 A HISTORY OF THE ART OF WAR IN THE MIDDLE AGES 162 (1978)). Latimer concedes, however, that other historians contest whether such retreats were in fact deliberate. *Id.* (citing HANS DELBRÜCK, 3 HISTORY OF THE ART OF WAR WITHIN THE FRAMEWORK OF POLITICAL HISTORY 159 (1982)).

[201] LATIMER *supra* note 200, at 13 (citing J. G. D. DAVIES, OWEN GLYN DWR 45–50 (1934)).

[202] Wingfield, *supra* note 196, at 131 (citing BARBARA TUCHMAN, A DISTANT MIRROR: THE CALAMITOUS 14TH CENTURY 64 (Knopf 1993) (1978)).

[203] Draper, *supra* note 196, at 17.

armed forces . . . ."[204] Fifty-three enumerated examples of service discrediting conduct, from animal abuse to wearing unauthorized insignia, follow the general article. Article 134 also permits non-enumerated charges based on breaches of service customs.[205] While some examples allude to notions of honorable service,[206] none tracks or even approximates perfidy or law-of-war principles generally.

Even champions of the principle of chivalry concede its erosion as a recognized limit on warfare.[207] In addition to suffering ambiguity, customary chivalry has at times rested on false assumptions of universality. Howard notes that "an assumption of common values" governing the conduct of hostilities marked the Grotian era—a period from the late seventeenth century to the Hague Conferences.[208] Yet he argues the twentieth century World Wars marked the end of this era and especially its accompanying assumptions with respect to law-of-war custom and principles. The World Wars revealed that notions of acceptable conduct and especially of honor and chivalry were not universal, particularly in East Asia where honor was derived from "a totally different cultural tradition."[209]

Although law-of-war principles have long been conceded to operate vaguely as noted above, notions of chivalry at this point may be so indeterminate as to be unenforceable. Chivalry seems ultimately to be found in the eye of the beholder rather than generally accepted laws of war.[210] And regardless whether one accepts chivalry as a present principle of the law of war or not, such an honor-bound tenet seems unlikely to operate effectively in combat pitting asymmetric or non-peer

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[204] 10 U.S.C. § 934 (2013).

[205] 2012 MCM, *supra* note 71, pt. IV, ¶ 60.c.(2)(b). The manual explains breaches of customs of service as behavior inconsistent with "long established practices which by common usage have attained the force of law in the military or Community affected by them." *Id.*

[206] *Id.* ¶¶ 62, 69, 83, 89, 107 (enumerating Adultery, Wrongful Cohabitation, Fraternization, Indecent Language, Straggling as punishable offenses).

[207] Sharp observes, "Chivalrous conduct is a broad concept which has lost its effectiveness as an independent principle that governs the conduct of war." Sharp, *supra* note 196, at 31.

[208] Howard et al., *supra* note 2, at 7–8.

[209] *Id.* at 8.

[210] *See* Roberts, *supra* note 124, at 115. Roberts observes, "Chivalry has proven to be an ineffective deterrent to proscribed conduct in modern warfare. . . . In short, chivalry is not generally recognized as a practical restraint on war . . . ." *Id.* at 115–16 (citing U.S. DEP'T OF ARMY, PAM. 27-161-22, INTERNATIONAL LAW 15 (1962) (obsolete)).

competitors as so many modern armed conflicts do.[211] In response, some maintain the groundings of custom and principles of the law of war have shifted. Perhaps law-of-war principles no longer spring from contractual promissory exchanges but rather "informal conventions" that prescribe lawful behavior, drawn from "norms of human dignity and individual rights."[212] Under such a theory, the prospect that an enemy will not reciprocate adherence to law-of-war principles weakens the case for retaliatory abandonment of law. The theory is attractive with respect to the most widely accepted principles such as necessity, discrimination, proportionality, and humanity. However, the possibility a principle as debated and indeterminate as chivalry would continue to operate in the face of persistent enemy violations seems unlikely.

Ultimately, the case for an extant principle of chivalry that includes a prohibition on perfidy broader than that articulated by current treaty law seems doubtful. Claims to chivalry's survival in the modern law of war seem more nostalgic than descriptive. Chivalry as a principle, and any conception of prohibited perfidy it included, would be unlikely to actually regulate the conduct of hostilities or form a reliable basis for law-of-war enforcement efforts such as criminal prosecution. Few military trial counsel, few international tribunal prosecutors, and few operational legal advisors would dare hitch their professional reputations to an analysis of perfidy that strayed so far from the codified perfidy prohibition.[213] Much like the Hague Regulations' early twentieth-century track record has been described, a chivalry-based perfidy prohibition might constitute at most merely an "aid to vilification."[214]

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[211] For discussion of legal considerations in asymmetric warfare generally, see Wolff Heintschel von Heinegg, *Asymmetric Warfare: How to Respond?*, 87 INT'L L. STUD. 463 (2011); Michael N. Schmitt, *Asymmetric Warfare and International Humanitarian Law*, *in* INTERNATIONAL HUMANITARIAN LAW FACING NEW CHALLENGES (Wolff Heintschel von Heinegg, et al. eds., 2007); Robin Geiß, *Asymmetric Conflict Structures*, 88 INT'L REV. RED CROSS 757 (2006).

[212] THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW (2006); Robert D. Sloane, *Prologue to a Voluntarist War Convention*, 106 MICH. L. REV. 443, 446 (2008); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239 (2000).

[213] The U.S. military justice system offers the potential of charging war crimes at court-martial on the basis of law-of-war principles. Article 18 of the Uniform Code of Military Justice establishes general court-martial jurisdiction "to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818 (2013). To the author's knowledge no U.S. court-martial has tried such a case to completion.

[214] BEST, *supra* note 95, at 47.

IV. Military Deception Short of Perfidy

A complete understanding of law-of-war perfidy finally requires an understanding of what perfidy is not. Since the 1880 Oxford Manual, reservations highlighting lawful military deception and ruses of war have closely followed codifications of the perfidy prohibition. States have clearly and consistently distinguished ruses and other acceptable forms of military deception from perfidy and treachery. As with perfidy, however, a clear conception of permissible ruses and deception is elusive.

What unifies ruses and what perhaps distinguishes them best from perfidy is resort to means unrelated to law-of-war protection. Lawful ruses do not seek to deceive adversaries with regard to duties or obligations under the law of war. In particular, ruses do not feign law-of-war protected status such as the *hors de combat* or civilian.[215] Ruses do not invite an enemy to place confidence—to rely detrimentally upon—an apparent claim to the protections of the law of war. Kalshoven usefully describes ruses as "those acts which the enemy would have had reason to expect, or in any event had no reason not to expect."[216] Thus, the range of permissible ruses is in some sense tied to historic military practice and custom.

At the same time, the most successful deceptions seem to involve significant innovation and imagination.[217] Specific examples of permissible deception have included, "decoys, dummy artillery pieces, aircraft, or tanks; ambushes; mock operations; feigned attacks or retreats; communicating with non-existent units; simulating the noise of an advancing column; using small units to simulate large forces; allowing the enemy to intercept false documents; altering landmarks and road

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[215] The term *hors de combat* describes classes of combatants who no longer take part in hostilities either voluntarily through surrender or by physical incapacitation from combat. *See* FRITS KALSHOVEN & LIESBETH ZEGVELD, CONSTRAINTS ON THE WAGING OF WAR: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW 69 (2001) (describing protection under Common Article 3 of the 1949 Geneva Conventions for persons *hors de combat*).

[216] FRITS KALSHOVEN, THE LAW OF WARFARE: A SUMMARY OF ITS RECENT HISTORY AND TRENDS IN DEVELOPMENT 102 (1973).

[217] Harlan W. Jencks, *Strategic Deception in The Chinese Civil War*, *in* STRATEGIC MILITARY DECEPTION (Daniel & Herbig eds., 1982) (describing Chinese Communist use of large-scale decoys and simulated retreat in May 1947).

signs; and misinformation . . . ."[218] Military history is replete with such clever schemes of deception, often pivotal to tactical and even strategic outcomes.[219]

Although its regular use appeared relatively late in the history of warfare, camouflage is widely and consistently touted as a lawful form of military deception.[220] Additional Protocol I specifically includes "use of camouflage" among ruses not prohibited.[221] The idea behind camouflage, of course, is to make objects invisible, "to merge them with their surroundings."[222] Effective camouflage frequently employs patterns that imitate an object's background.[223] More subtly, it has been suggested that camouflage is actually, "concealing the fact that you are

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[218] SOLIS, *supra* note 189, at 427 (citing 1977 Additional Protocol I, *supra* note 41, art. 37); DINSTEIN, *supra* note 37, at 240; THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW ¶ 471 (Dieter Fleck ed., 2d ed. 2008).

[219] DAVID GLANTZ, SOVIET MILITARY DECEPTION IN THE SECOND WORLD WAR 2–4 (1989) (describing especially, the Soviet deception concept of *Maskirovka*); EPHRAIM KAM, SURPRISE ATTACK 7 (1988) (explaining psychological effects of surprise based on deception); CHARLES CRUICKSHANK, DECEPTION IN WORLD WAR II, at 206–14 (1979) (recounting dozens of military deception schemes from strategic to tactical levels).

[220] GUY HARTCUP, CAMOUFLAGE: A HISTORY OF CONCEALMENT AND DECEPTION IN WAR 12 (1980). Hartcup adds, "The first troops to wear khaki were the Indian Guides, a paramilitary force raised by Col Sir Harry Lumsden in 1846." *Id.* at 12 (citing P. Cadell, *Beginnings of Khaki*, 31 J. SOC. ARMY HIST. RES. (1953)). Camouflage historians surmise that military resistance to camouflage was rooted in notions of honor and manliness. Berhens notes that at the end of the nineteenth century camouflage was thought "unmanly or effeminate." ROY BEHRENS, CAMOUPEDIA 8 (2009) (citing H.G. WELLS, WAR AND THE FUTURE: ITALY, FRANCE AND BRITAIN AT WAR IN 1917 (1917)). Behrens also surmises that early camouflage demonstrations too frequently embarrassed political and military decision makers generating resistance. *Id.* at 213. He observes, "Undoubtedly one of the reasons why military officers were resistant to camouflage is that during their inspections too often if made them look stupid." *Id.* Behrens's text includes a photograph of a well-camouflaged soldier at the feet of President Wilson and General John 'Blackjack' Pershing. *Id.*

[221] 1977 Additional Protocol I, *supra* note 41, art. 37(2).

[222] Salvador Dalí, *Total Camouflage for Total War*, *in* THE COLLECTED WRITINGS OF SALVADOR DALÍ (Haim Finklestein ed., 1998). Artists were involved in the development and employment of military camouflage since its inception. Biologists contributed widely to military understandings of camouflage and protective coloration as well. Abbott H. Thayer, *The Law Which Underlies Protective Coloration*, 13 THE AUK 477 (1896).

[223] Roy R. Behrens, *Revisiting Abbott Thayer: Non-Scientific Reflections about Camouflage in Art, War and Zoology*, 364 PHIL. TRANS. ROYAL SOC. BIOLOGY 497, 500 (2009) (citing Gerald Thayer, *Camouflage in Nature and In War*, 10 BROOK. MUSEUM Q. 159 (1923)).

concealing."[224] Early efforts at camouflage appear to have employed natural materials immediately available to armed forces.[225] Later, military units dedicated to camouflage operations emerged, employing paint and synthetic materials that resembled natural materials.[226] Today, the wear of camouflage-patterned clothing is so-widely used by armed forces as to be in many contexts itself a distinctive and visible claim to combat status on the battlefield.

Although widely accepted and practiced as a means of military ruse, camouflage may be underappreciated as a source of close questions concerning perfidy. For instance, there is debate whether disguising military objectives as civilian objects constitutes lawful camouflage. One commentator observes, "it is a common practice, not prohibited by Geneva Protocol I, to disguise a military object to appear to be a civilian object."[227] Although the practice described might be more accurately labeled "mimicry,"[228] than camouflage, this view was thought technically correct in a number of historical cases.

During the Second World War, industrial camouflage schemes went to extraordinary length to give aircraft factories and other military industrial complexes the appearance of civilian neighborhoods.[229] The United States fabricated complete towns, including houses, streets, and trees, atop the roofs of the Boeing Corporation's Seattle military aircraft assembly plants.[230] Other U.S. industrial camouflage schemes included the addition of false church spires to critical factories.[231] In fact, U.S. industrial camouflage practice was advanced enough to inspire a manual on the topic jointly published by the Department of Agriculture and the

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[224] HARTCUP, *supra* note 220, at 7. Hartcup elaborates that military camouflage is more complex, involving "concealment, deception or misdirection, and screening." *Id.*

[225] U.S. ARMY CORPS OF ENG'RS, U.S. WAR DEP'T, ENG'R INSTR. MANUAL NO. 3: CAMOUFLAGE 3 (1917).

[226] *See* ANN ELIAS, CAMOUFLAGE AUSTRALIA: ART, NATURE, SCIENCE AND WAR4 (2011). Elias observes, "It was in WWI, in France and later Britain, Germany and the US, that innovations in military camouflage developed, and when camouflage units and camouflage specialists were first made officially part of military organisations." *Id*.

[227] J. Ashley Roach, *Ruses and Perfidy: Deception during Armed Conflict*, 23 U. TOL. L. REV. 395, 400 (1991).

[228] Thayer, *supra* note 222, at 477 ("Mimicry makes an animal appear to be some other thing, whereas [protective coloration] makes him cease to appear to exist at all.").

[229] BEHRENS, *supra* note 220, at 39, 120.

[230] *Id.* at 39. The Douglas and Lockheed companies employed similar schemes at their aircraft manufacturing sites. *Id.* at 120.

[231] *Id.* United States aircraft manufacturers hired civilian camoufleurs to cover buildings with dummy civilian structures. *Id.*

Pratt Institute Art School.[232] The manual recommends camouflaging roofs of factories to resemble small homes and back yards.[233]

The United States was not alone in the practice of masking military objectives as civilian objects. The civil defense plan of Australia involved disguising munitions bunkers and bomber hangers to simulate domestic houses and public buildings.[234] Australia even went a step further than masking civilian industrial sites. At the Bankstown military fighter and interceptor station outside Sydney, the Australian Air Force employed one of the most elaborate civilian mimicry efforts of the war.[235] Under the guidance of the dogged proponent of camouflage William Dakin, the Australians configured the base to appear as a small rural town. Ann Elias relates the project:

> The results exceeded Dakin's expectations. Out of plywood, hessian and linoflage, camouflage labourers built spectacular structures mimicking the types of domestic and commercial buildings commonly found in the Bankstown region in 1940. But hidden behind their innocent-looking facades, ones that blended so well with the Sydney environs, were fighter and bomber aircraft and munitions dumps. Aircraft hideouts masquerading as domestic houses, other buildings as a sawmill, an ironmonger's store with a with a quick release door in a simulated wall, a grandstand, an advertisement hoarding, a "hovel" to fit in the low socio-economic profile of the area.[236]

The Bankstown project is not merely remarkable for its elaborate and confident mimicry of "innocent-looking" objects. The Australians'

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[232] KONRAD F. WITTMAN, INDUSTRIAL CAMOUFLAGE MANUAL (1942). Not to be outdone, the U.S. Department of War issued its own manual on camouflage of civilian installations. U.S. WAR DEP'T, CIVILIAN DEFENSE: PROTECTIVE CONCEALMENT (1942) (suggesting military industrial facilities mimic civilian buildings).

[233] WITTMAN, *supra* note 232, at 51. In fairness, a large part of the manual's work is dedicated to topics other than mimicry of civilian structures, such as deceptive shading, dispersal of buildings, distortion of shadows, and concealment of transportation routes. *Id.* at 37, 45.

[234] ELIAS, *supra* note 226, at xiv, 7.

[235] *Id.* at 36 (quoting *Disguise and Concealment*, AIR INTELLIGENCE REPS. (National Archives of Australia, ser. C1707, item 36, at 1)).

[236] ELIAS, *supra* note 226, at 36. Elias includes a convincing photo of a bomber hanger disguised as a single-family home. *Id.* at 34.

professed purpose for the Bansktown scheme was "for attack as well as defence, and for aggressive surprise. These roughly made large-scale buildings mimicking the vernacular architecture of Sydney concealed bomber and fighter planes ready to take to the air at short notice . . . ."[237]

Other Allied powers engaged in similar schemes. After their debacle at Dunkirk, the British disguised domestic pill-boxes and gun positions as "public lavatories, chicken houses, or romantic ruins . . . ."[238] Yet discretion, or perhaps a stronger sensibility for potential treachery than their allies', led the British to reject proposals to affix church false steeples on a high building at the Rolls-Royce factory at Derby in May 1939.[239] An official disapproved, rightly concluding that the scheme would induce enemy bombardments of churches if discovered.[240]

To be sure, a critical aspect of perfidy is present in each of these camouflage schemes, namely, feigned resort to a protected law-of-war status, that of civilian object. But, permitting retroactive application of the AP I perfidy prohibition, none of the schemes would likely constitute prohibited perfidy. Most schemes failed to result in enemy casualties or capture directly. While the equipment produced by camouflaged industrial facilities might ultimately have produced enemy casualties, the majority view does not include such effects as sufficient to constitute perfidy. Only the Bankstown project was capable of combining its deception with any form of offensive action or attack. Still, the linkage between the hangars' feigned civilian status and any enemy pilots being shot down by interceptors launched from the base was likely too remote or indirect for AP I prohibited perfidy.

Yet the traditional concerns of perfidy, the suspicion generated generally toward the feigned protected class especially, are surely apposite to each scheme. Despite widespread practice, the dangerous implications of such arrangements for civilians and civilian objects are clear. An enemy confronting feigned civilian objects might come to view with suspicion and soon with enmity the entire class of civilians. More dangerously, that enemy might view as suspect other or even all law-of-war classes of protection, launching a dangerous tit-for-tat spiral toward unrestrained war.

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[237] *Id.* at 37.
[238] HARTCUP, *supra* note 220, at 81.
[239] *Id.* at 54.
[240] *Id.*

It seems highly unlikely that any State committed to honoring the object and purpose of restraints in war would adopt such schemes today. Still, only such purposive analyses or very broad conceptions of fairness and good faith in the conduct of warfare could be said to limit resort to civilian camouflage and mimicry for general military advantage. It is unclear from law-of-war doctrine and scholarship whether such a general duty existed at the time or whether such a duty exists today.

Applying by analogy the distinctions States have made so regularly between perfidy and legitimate military deception and ruses is equally difficult in modern warfare. Some examples are relatively straightforward. For instance, use of enemy signals has traditionally been regarded as an acceptable form of deception.[241] Use of false distress signals or signals reserved for medical aircraft is prohibited.[242] It seems clear then that vectors of cyber attack that mimic enemy cyber traffic for malicious or destructive purposes constitute lawful ruses. While masking malware as medical or distress cyber signals would not.

Applying the traditionally accepted use of camouflage to cyberspace, however, produces confounding analytical difficulty. At first blush, a number of cyber attack scenarios seem relevant to the camouflage distinction. In particular, logic bombs and other malware that lie dormant or hidden for latter use seem in many respects to resemble use of camouflage or mimicry. These surreptitious cyber means appear to constitute important features of States' cyber arsenals.[243] Logic bombs typically embed themselves in surrounding, legitimate code. Even if noticed, the code comprising the best logic bombs will seem innocuous to all but the keenest eyes and electronic scans. Thus the conclusion that logic bombs are a form of lawful camouflage is attractive.

On closer examination, however, difficulties arise. As related earlier, the least objectionable uses of camouflage involve matching an object or person's appearance with a natural environment. The use of naturally occurring foliage and other features of terrain is most common. It is in this sense that camouflage is understood as an effort to escape notice at all. Mimicry, on the other hand, though often conceived as a

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[241] GERMAN IHL MANUAL, *supra* note 56, ¶ 471.

[242] U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS ¶ 8-4(b) (1976).

[243] *See* Paul A. Walker, *Traditional Military Activities in Cyberspace: Preparing for "Netwar,"* 22 FLA. J. INT'L L. 333, 349–51 (2010) (describing hidden "force positioning" and latent "kill switches" in cyber space).

form of camouflage, does not involve escaping notice but rather deceiving the viewer as to the nature of the object or person perceived. The Second World War industrial camouflage schemes described previously are more likely forms of mimicry. They did not really escape the notice of enemy aircraft crews. They deceived aircrews as to their true military nature.

Upon reflection, cyber camouflage seems much more similar to civilian mimicry than to pure camouflage. Most fundamentally, cyberspace seems not to offer anything like a natural environment. Being an entirely human creation, all of cyberspace, including its pathways, the cables, satellites, nodes, and signals of networks, and its endpoints, the terminals, servers, memory, programs and processors constitute manmade objects for law-of-war purposes. More importantly, all of cyberspace constitutes an instrumentality—a means of accomplishing functionality or some desired end. In the overwhelming majority of cases, malware that seeks to go unnoticed cannot pose merely as part of a naturally occurring background. Rather, hidden malware such as a logic bomb or deeply embedded rootkit mimics the innocuous, usually civilian, objects or lines of code that surround it. Indeed, the goal of the malware designer is entirely for users and detection programs to perceive malware as a seamless part of legitimate background code.

As the preceding historical and current examples illustrate, the line between lawful ruse and prohibited perfidy remains blurred at best. If States' century-long effort at converting the perfidy prohibition from a broadly articulated principle to a specific prohibition was intended to produce doctrinal clarity, with respect to distinguishing ruse from perfidy, that effort has failed in significant respects. We are still left, it seems, in the place of the Lieber Code: guided more by broad sensibilities of what is right or moral than by what has been received by States as hard law.

V. The Future of Law-of-War Perfidy

Conversion of the perfidy prohibition from a general principle understood broadly by armed forces into a specific, technically-bound, law-of-war prohibition has undoubtedly conditioned modern military lawyers and international jurists to think of perfidy in far narrower terms than their predecessors. While codified examples and the AP I definition of perfidy in particular likely removed a degree of subjective slack, the

price of clarity has been a less effective guarantee of the sanctity of the law of war as a means of minimal humanitarian exchange between belligerents.

Although a conception of perfidy that appreciates the three categories of AP I perfidy does justice to States' legislative choices, the distinctions made by AP I between categories of perfidy undervalue the fact that all perfidy, whether simple, prohibited, or grave, threatens combatants' faith in the law of war. Commenting on AP I generally, Geoffrey Best observed, "it reads like the work of lawyers writing for lawyers . . . ."[244] The narrowed perfidy prohibition is a case in point—of far greater utility and service to prosecutors and defense counsel than to the true end users and ideals of the law of war.

Again, fidelity to principled interpretation of existing law prevents accepting a vision of universally prohibited perfidy that accepts effects short of killing and injury. Including in prohibited perfidy situations that merely result in gains in military or tactical advantage strains both the literal, treaty-based expression of perfidy and marginalizes its plain twentieth century evolutionary path from broad principle to specific prohibition. At present, an approach that abandons or ignores States' deliberate legislative work does not offer the law or its beneficiaries any real favors. Yet as a matter of *lex ferenda*, there is work to be done in this area—a broadening, if you will, of the concept of what constitutes treacherous conduct in emerging forms of warfare.

If the difficulty of policing bad faith resort to law-of-war protection was limited to the semantics and wording of the perfidy prohibition, the task of rectifying its shortcomings might be manageable. However, a final structural aspect of the existing law of war renders the perfidy prohibition under-inclusive, particularly with respect to emerging forms of warfare.

In addition to doctrinal narrowing by AP I and conceptual difficulties surrounding analogies to accepted lawful forms of deception and mimicry, a number of important structural facets of the law of war limit

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[244] BEST, *supra* note 95, at 270. Adam Roberts echoes the thought observing, "Lawyers tend to think in terms of enforcement through legal processes after a violation, though implementation may take many other forms. Indeed, enforcement's most important aspect is implementation through education and training in well-organized armed forces." Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, 6 DUKE J. COMP. & INT'L L. 1, 16 (1995).

the application and operation of the perfidy prohibition in modern conflict and military operations. First, law-of-war perfidy prohibitions are limited to conduct during armed conflict.[245] Only when the relevant conditions of material application exist do law-of-war prohibitions, such as that against perfidy, operate as a matter of law. The most widely used test for establishing conditions of armed conflict requires "resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[246] Attacks conducted in a purely criminal context or lacking a sufficient nexus to armed conflict, no matter how egregiously they might betray a victim's confidence, do not provoke law-of-war perfidy prohibitions.

A second limit on the operation of law-of-war perfidy prohibitions in the cyber context is the threshold of attack. Classically, *jus in bello* constraints on the conduct of targeting operations only apply to parties' actions during attacks.[247] Law-of-war principles such as distinction and proportionality apply far less clearly, if at all, to actions short of attack such as reconnaissance or espionage. As the ICRC notes, perfidy is a rule peculiar to combat.[248] Consequently, law-of-war perfidy only occurs during operations that qualify as attacks in a *de jure* sense. Although the discourse of emerging domains of conflict such as cyberspace uses the term "attack" to refer to any number of malicious efforts or unauthorized actions, "attack" remains a legal term of art in the law of war.[249] Thus cyber-theft, cyber-espionage, cyber-exploitation, and mere disruptions of service, even if committed in connection with an armed conflict, fail to

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[245] 1977 Additional Protocol I, *supra* note 41, art. 1(4).

[246] Prosecutor v. Dusko Tadić, Case No. IT-94-1-A, Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

[247] *See* Michael N. Schmitt, *Attack as a Term of Art in International Law: The Cyber Operations Context*, *in* CZOSSECK ET AL., 4TH INTERNATIONAL CONFERENCE ON CYBER CONFLICT: PROCEEDINGS 283, 289–92 (2012) (advocating an understanding of attack in cyber warfare limited to destructive acts). *But see* INT'L COMM. OF THE RED CROSS, 31ST INT'L CONFERENCE OF THE RED CROSS AND RED CRESCENT, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS, REPORT 311C/11/5.1.2 (Oct. 2011) (applying law-of-war limits on notions of military objectives to cyber operations seemingly short of attack resulting in destruction).

[248] AP I COMMENTARY, *supra* note 123, ¶ 1484.

[249] 1977 Additional Protocol I, *supra* note 41, art. 49; TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE r. 30 & r. 30 cmt. (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL], *available at* http://www.ccdcoe.org/249.html (collecting an international group of experts' interpretation of how the existing law of war applies to cyber warfare); Walker, *supra* note 243, at 333 (2010).

rise to the level of attack at all and therefore do not implicate the prohibition of perfidy.[250]

A further structural feature of the law of war relating to protected classes reduces the potential for application of the perfidy prohibition to many contexts of conflict. A correct understanding of the elements of perfidy limits resort to the prohibition outside armed conflict by recalling that only feigned *law-of-war* protected status qualifies as perfidy.[251] Some law-of-war protected classes involve extensive prerequisites and qualification criteria.[252] Additionally, recall that law-of-war protected status is only available during armed conflict. Deceptive resort to a law-of-war protected status outside the context of an armed conflict would usually not have the desired effect or provoke the forbearance it would in the context of ongoing hostilities.

Reprising the cyber context, imagine malware posing as an electronic communication to a prisoner of war. The message is arguably a form of communication protected by the law of war.[253] Thus in theory, by resorting to a law-of-war protected class, the message is an invitation to confidence, the sort required to establish perfidy. Yet the message would only constitute an effective deception in a situation where prisoner-of-war status is recognized. No State involved in a situation short of international armed conflict—the only hostilities where prisoner of war status is available—would be induced to confidence by the feigned message.

Whatever one's conception of the perfidy prohibition, the overwhelming majority of conflicts, even armed conflicts as understood by the law of war, do not implicate perfidy because they do not satisfy the structural thresholds of the law of war. Thus only attacks that occur in the context of or which constitute armed conflict themselves and implicate a law-of-war protected class engage the perfidy prohibition at all.

Still, in spirit, perfidy and treachery have always captured a great deal of what is so troubling about deceptive attacks. A battlefield on which civilian and other law-of-war protected classes are routinely

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[250] TALLINN MANUAL, *supra* note 249, r. 30 & r. 30 cmt.
[251] *See* discussion *supra* accompanying notes 153–59.
[252] *See, e.g.*, 1949 Geneva Convention III, *supra* note 53, art. 4.
[253] TALLINN MANUAL, *supra* note 249, r. 76 & r. 76 cmt.

feigned greatly depletes general confidence in the law of war. If the technical case for perfidy in such cases is sometimes weak, one wonders how long States will accept the fallout from that gap.

A number of commentators have called for a revised expression of the perfidy prohibition.[254] A functionalist or teleological examination of perfidy may reconcile some of the practical ruptures between what is perfidy and what is actually prohibited. The inspiration for the perfidy rule appears to come from traditional martial principles of honor and chivalry. Conduct not consistent with the traditions of the profession of arms yet short of true perfidy may be proscribed by a broader principle. Indeed, for those maintaining a legal distinction between treachery and perfidy, the former remains a broader rule enforcing notions of honorable combat. These early sources were understood to prohibit assassination, bounties, rewards against enemies, and criminalizing enemy status.

By the mid-late twentieth century, however, the grounding of the perfidy prohibition seems to have evolved toward vindicating more humanitarian purposes. Rather than protect combatant victims from dishonorable or unfair attacks, the purpose of prohibiting perfidy grew to guard the protected classes whose identity the perfidious attacker betrays. More importantly perhaps, the perfidy prohibition serves humanity by guarding the integrity of the law of war as a whole. While one might still say that soldiers and combatants enjoy protection, it is, in a sense, a collateral form of protection. The true object of protection from perfidy is the class of persons that ordinarily or legitimately benefits from the rule of protection abused by the perfidious actor. Civilians, the wounded, and those offering surrender or truce enjoy more reliable protection when soldiers are confident that their forbearance in attacking these persons will not be betrayed or used against them. Perfidious conduct degrades the humanitarian protections of victims, objects, and emblems whose identities are abused.[255] As the situations in Afghanistan and Iraq sadly confirmed, the battlefields on which civilian status is regularly feigned for purposes of attack becomes a profoundly dangerous place for all civilians and civilian objects.

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[254] Greene, *supra* note 21, at 45; Brown, *supra* note 191, at 204–05; Fleck, *supra* note 144, at 270 (remarking "Current international treaties deal with ruses of war in far too general terms which reflect the minor significance attached to the element of deception by the traditional 'strategical' school of thought.").

[255] BOTHE ET AL., *supra* note 138, at 202.

A final rationale for the perfidy prohibition is to preserve the possibility of a return to peace. To prevent the degradation of trust and the bad faith between warring parties that would impede negotiation of peace terms. An effective perfidy prohibition preserves the good faith upon which ceasefires, armistices, and conclusions of hostilities rely.[256] To prove the point, it seems the most intractable, enduring armed conflicts have been those where belligerents have lacked reliable mediums of exchange and communication as the law of war surely is.

Thus perhaps reinvigoration of a principle of chivalry or honor is indeed in order. Or perhaps development of a broader concept of treachery, distinct from the post-AP I narrow and technical notions associated with perfidy, is appropriate. Suggestions to return to a law of war derived from purely moral principles reminiscent of early law-of-war theorists such as Halleck[257] may even be persuasive.[258] At present, a principled remedy to the shortcomings of prohibited perfidy exposed by very real prospect of cyber warfare seems to require a degree of methodological consensus that does not exist between States.[259] Though addressing neither perfidy nor cyber warfare specifically, the thoughts of Professor Roberts clarify the doctrinal dilemma presented.

> The experience of land war in two world wars must raise a question as to whether formal legal codification is necessarily superior to the notions of custom, honor, professional standards, and natural law which preceded it. Codification in treaty form has such compelling virtues—verbal clarity, equal standards, the securing of formal acceptance by states—that it is bound to remain a central aspect of the laws of war. On the other hand, it risks being too rigid in face of changing situations and technologies; and it can make rules seem like artificial external impositions, rather than a natural outgrowth of

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[256] *See* Childress, *supra* note 59, at 49–50 (relating Lieber's concern that assassination, treachery and other violations of confidence between adversaries "make[] the return to peace unnecessarily difficult").

[257] *See supra* text accompanying note 77.

[258] Ingrid Detter, *The Law of War and Illegal Combatants*, 75 GEO. WASH. L. REV. 1049, 1054 (2007) (advocating a return to peremptory rules derived from natural law and ethics).

[259] For instance, disagreement whether to regulate Internet-based communications plagued the recent International Telephone and Telegraph Union treaty conference provoked the United States to decline signature.

> the interests and experiences of a state and its armed forces.[260]

VI. Conclusion

More frequently than the volume and content of academic commentary suggests, the extant law of war proves adequate to the challenge of preserving humanity in modern warfare. Law-of-war principles such as distinction, proportionality, military necessity, and humanity go far toward civilizing hostilities and safeguarding civilians from the effects of destructive military operations. Additionally, specific prohibitions of the law of war such as restraints on attacking medical facilities or objects indispensable to the survival of civilian populations operate clearly in warfare.

While modern warfare surely raises new challenges to the regulation of hostilities, the principles and values at stake seem familiar. Warfare remains a human behavioral realm far more than an abstract or mere spatial dimension.[261] Consistent with its utility in regulating human relationships generally, the law-of-war prohibition on perfidious betrayal has been vital to regulated violence. More than a mere rule, the perfidy prohibition is one of very few essential *structural* aspects of the law of war. The efficacy of nearly every other rule of war is compromised by violation of the perfidy prohibition. With the possible exception of deliberate indiscriminate attack, few law-of-war breaches signal contempt for humanity and respect in war as clearly as perfidy does.[262] The breaking of faith reflected in perfidy manages to alienate belligerents to a degree that not even the systematic violence of war itself matches.

Despite a century of international legislative attention and the apparent increasing frequency of perfidy in modern warfare, most criminal, military doctrinal, and even academic treatments of the subject merely restate codifications or offer no more than a vague sensibility of perfidy. Codification has undoubtedly weakened the perfidy prohibition in some respects. In its current form and particularly in emerging

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[260] Roberts, *supra* note 94, at 137.
[261] SUSAN BRENNER, CYBERTHREATS 9 (2009).
[262] *See* Louis René Beres, *Religious Extremism and International Legal Norms: Perfidy, Preemption, and Irrationality*, 39 CASE W. RES. J. INT'L L. 709 (2008) (explaining extremist rejection of international legal norms such as perfidy).

contexts of armed conflict such as cyberspace, the perfidy prohibition is unable to fully vindicate the values that perhaps it should. The records of positive codification include evidence that States may have reached the limits of consensus on international regulation of perfidy. Furthermore, there are indications States' appetites for regulating warfare through additional treaties or even specific prohibitions are meager.[263] States appear content, for now, with a relatively high degree of legal indeterminacy with respect to regulating emerging forms of warfare. At the same time, claims to a complementary, broad-based perfidy prohibition derived from notions and principles of chivalry and honor are overstated. Such claims seem grounded in little more than nostalgia, hardly worthy of legal recognition.

Overall, something of the gravity of perfidy, appreciated so well in former custom and usage, appears to have been lost. Despite strong intuitive and logical valence, the legal relationship between emerging deception-based forms of warfare and positive prohibitions of perfidy is strained and in many ways deficient. The existing law-of-war perfidy prohibition appears under-inclusive and addresses insufficiently scenarios of attack that compromise good faith between combatants. States' expression of perfidy as a narrowly-crafted, specific prohibition rather than as a general principle has greatly compromised the capacity of this critical law-of-war limit to regulate emerging, unforeseen technical developments in armed conflict such as cyber warfare.

As some commentators have noted, if technicalities of the currently expressed prohibition of perfidy prevent its application to all battlefield betrayals of confidence, resort to a broader notion of treachery or even a principle of chivalry may both preserve a measure of moderation in combat for the individual combatant and guard the integrity of the law of war as a means of humane exchange in war.[264] Support for such a general notion of chivalry may have been more apparent in previous law-of-war eras. The sixteenth century law-of-war jurist Ayala observed, "They of olden time always held that there was no grander or more

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[263] Sean Kanuck, *Sovereign Discourse on Cyber Conflict under International Law*, 88 TEX. L. REV. 1571 (2010) (noting lack of international consensus on information security recorded in U.N. Secretary-General, *Group of Government Experts on Developments in the Field of Information and Telecommunications in the Context of International Security, P5, delivered to the General Assembly*, U.N. Doc. A/60/202 (Aug. 5, 2005)).

[264] CANADIAN MANUAL, *supra* note 56, ¶ 7 (stating, "The concept of chivalry makes armed conflict slightly less savage and more civilized for the individual combatant.").

sacred matter in human life than good faith . . . ."[265] Yet presently, support for such a widely accepted and commonly shared notion of honesty and honor in combat appears wanting. States appear unwilling or unable to offer the refinements and understandings needed to operationalize a principle of chivalry.

At present, the more feasible course of action appears to be a refinement to the AP I specific prohibition. An investment of relatively little legislative energy would seem to remedy the shortcomings identified in this article. At a minimum, expanding the effects sufficient to include damage to objects would greatly deter bad faith resort to law-of-war protected status. More ambitiously, AP I perfidy might be amended to prohibit any bad faith resort to law-of-war protected status resulting in military advantage.

In the end, it is hoped this article's account and analysis of the mismatch between the demands of modern warfare and the current state of law-of-war perfidy, as well as the need to bolster the law of war as reliable mode of humanitarian exchange, will attract States' attention to this important humanitarian dilemma. If it does, debate will surely develop not only over expansion of the substantive reach of prohibited perfidy but also over the appropriate law making method for such an expansion. Whatever the outcome, reengaging States in the active formation of the law of war will surely better vindicate the historical and important law-of-war function of calibrating the balance military necessity and humanity than the current state of seeming inadequacy and neglect.

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[265] AYALA, *supra* note 115, at 55.

THE MILITARY'S DILUTION OF DOUBLE JEOPARDY: WHY *UNITED STATES v. EASTON* SHOULD BE OVERTURNED

MAJOR ROBERT D. MERRILL*

The federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy.[1]

I. Introduction

For over thirty years, Supreme Court case law on Double Jeopardy stood in stark conflict with the military's double jeopardy clause found in Article 44, Uniform Code of Military Justice (UCMJ). In 1978, in *Crist v. Bretz*, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment mandates that jeopardy attach upon a jury being empaneled.[2] The Court explained that a defendant's interest "in retaining a chosen jury . . . is now within the protection of the constitutional guarantee against double jeopardy."[3] Yet Article 44, the double jeopardy clause of the UCMJ, states that jeopardy attaches "after the introduction of evidence."[4] On June 4th, 2012, the Court of Appeals for the Armed Forces (CAAF), in the case of *United States v. Easton*, held that despite this conflict, Article 44 is constitutional.[5] In *Easton*, the CAAF rescued Article 44 by casually dismissing the defendant's interest "in retaining a chosen jury" as inapplicable to the military.[6]

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[1] Crist v. Bretz, 437 U.S. 28, 38 (1978).

[2] *Id*.

[3] *Id*. at 36.

[4] UCMJ art. 44 (2012).

[5] United States v. Easton, 71 M.J. 168, 170 (C.A.A.F. 2012).

[6] *Easton*, 71 M.J. at 174.

Six months later, the Supreme Court denied Easton's petition for certiorari.[7] This article argues that Congress should amend Article 44 to align with civilian law. Not only was *Easton* decided on faulty logical grounds, but it also set a dangerous precedent in which the CAAF was permitted to ignore the Supreme Court's interpretation of a core constitutional right, and on the flimsiest of justifications. This article first introduces *Easton*'s facts, holding, and logic. Then, the article examines *Easton*'s failings. First, the CAAF erroneously concluded that Congress did not intend for the attachment standards mandated by *Crist* to apply to the military. The history of both the Double Jeopardy Clause and the UCMJ tell otherwise. Second, the CAAF failed to confront decades of Supreme Court case law that outline the underlying purposes of the Double Jeopardy Clause, which run counter to *Easton*'s central holding. Finally, the CAAF failed to acknowledge that a military defendant's interest in a particular jury is likely to be greater than that of a civilian.

II. Introduction to *United States v. Easton*

In *United States v. Easton*, the CAAF confronted the constitutionality of Article 44.[8] Lieutenant Easton faced a charge of missing movement. Prior to jury empanelment, the military judge pointed out that two videotaped depositions were inaudible. The government decided to proceed anyway. Voir dire took place and a panel was sworn and assembled. However, before introduction of evidence, the charge was dismissed. Nearly a year later, identical charges were referred to a new court-martial. Easton was convicted of the later charges. The Army Court of Criminal Appeals avoided the constitutional question and held that there was manifest necessity for a new trial, and thus there was no double jeopardy violation.[9]

The CAAF disagreed with the lower court and found that there was no manifest necessity for a second trial.[10] Consequently, the CAAF directly confronted the question of whether the military is obligated to

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[7] Easton v. United States, 133 S. Ct. 930 (2013).
[8] *Easton*, 71 M.J. at 174.
[9] United States v. Easton, 70 M. J. 507, 513 (A. Ct. Crim. App. 2011). Manifest necessity is the standard adopted by the Supreme Court in 1824 to measure whether a retrial is justified due to unique or unforeseeable circumstances, such as a mistrial. United States v. Perez, 22 U.S. 579, 580 (1824).
[10] *Easton*, 71 M.J. at 174.

follow the Supreme Court's holding in *Crist* that jeopardy attaches when the jury is empaneled and sworn.[11] The CAAF held that, despite *Crist*, Article 44's designation of attachment at the introduction of evidence was constitutional.

According to the CAAF, *Crist* does not apply to the military because "in the military context, the accused does not have the same protected interest in retaining the panel of his choosing, and therefore jeopardy does not attach in a court-martial until evidence is introduced."[12] The court offered several bases for its conclusion. First, the court noted that the Sixth Amendment right to a jury was held, in 1942, not to apply to military commissions, and therefore "protecting the interest of an accused in retaining a chosen military 'jury' does not directly apply."[13] As further support for this proposition, the court noted that under Article 29, UCMJ, military judges have the authority to excuse members "for physical disability or other good cause" and that convening authorities may also excuse members "for good cause."[14] This "illustrates that, due to the unique nature of the military, an accused's chosen panel will not necessarily remain intact throughout a trial."[15] Consequently, the court concluded that "the Supreme Court's reasoning [in *Crist* does not] neatly or clearly apply in military practice, where the UCMJ and the courts have long held that a servicemember does not have a right to a particular jury."[16]

The CAAF's second major foundation for its conclusion lay in Congress's exercise of its constitutional authority "[t]o make Rules for the Government and Regulation of the land and naval Forces."[17] According to the CAAF, Congress evinced "a different purpose and legislative intent" from *Crist* in enacting the UCMJ.[18] First, Congress not only enacted Article 44, but it also enacted Article 29 which, as explained above, permits members to be excused under various circumstances. Furthermore, the CAAF noted that Article 16 permits three members without a military judge to sit as a court-martial, but they must be sworn before the accused is arraigned. The court noted, "[s]uch a panel could not properly function if jeopardy attached when members

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[11] Crist v. Bretz, 437 U.S. 28, 35 (1978).
[12] *Easton*, 71 M.J. at 169.
[13] *Id*. at 175.
[14] *Id.*
[15] *Id*.
[16] *Id.* at 176.
[17] *Id.* (quoting U.S. CONST. art. I, § 8).
[18] *Id.* at 175.

were sworn since they would not be able to perform any duties without jeopardy attaching."[19] For these reasons, the court found "[t]hat Congress was purposeful in selecting the point at which jeopardy attaches."[20] Therefore, the court refused to overturn the rule that Congress established in enacting Article 44.[21]

III. The Historical Failings of *Easton*

A. Antebellum Development of Double Jeopardy Jurisprudence

A brief examination of Double Jeopardy Clause history demonstrates that the Supreme Court's holding in *Crist* has deep roots which the CAAF was too quick to dismiss. Although double jeopardy concepts can be found in ancient Greek and Roman law, the Double Jeopardy Clause of the Fifth Amendment derives, not surprisingly, from English common law.[22] The English common law plea of *autrefois acquit* (former acquittal) prevented the state from prosecuting individuals for crimes of which they had already been acquitted.[23] As the American Revolution neared, William Blackstone declared it a "universal maxim of the common law" that "no man is to be brought into jeopardy of his life, more than once for the same offense."[24] This maxim and the common law plea of former acquittal were largely adopted by the colonies prior to ratification of the U.S. Constitution.[25]

In 1791, after various edits to the phrasing, the Double Jeopardy Clause of the Fifth Amendment was ratified by the States.[26] The antebellum understanding of the clause is quite different from U.S. modern double jeopardy jurisprudence. First, before ratification of the Fourteenth Amendment in 1868, the Double Jeopardy Clause only

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[19] *Id.* at 176.
[20] *Id*.
[21] *Id* at 177.
[22] JAY A. SIGLER, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY 21 (1969).
[23] GEORGE C. THOMAS III, DOUBLE JEOPARDY: THE HISTORY, THE LAW 83 (1998).
[24] 4 WILLIAM BLACKSTONE, COMMENTARIES *335.
[25] DAVID S. RUDSTEIN, DOUBLE JEOPARDY: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 12 (2004).
[26] *Id*. at 15.

restricted federal action.[27] Second, most antebellum jurists interpreted the Clause to bar only retrials in cases that had reached acquittal or conviction.[28] Thus, there was no widely-accepted concept of jeopardy attaching prior to acquittal or conviction. As Joseph Story explained in 1833, the Clause does not mean "that he shall not be tried for the offence a second time, if the jury has been discharged without giving any verdict . . . for, in such a case, his life or limb cannot judicially be said to have been put in jeopardy."[29] Similarly, Justice Washington declared in 1823 that "jeopardy" means "nothing short of the acquittal or conviction of the prisoner, and the judgment of the court thereupon."[30]

As the nineteenth century progressed, however, numerous states and state courts began to place the point of jeopardy attachment earlier in the trial. Numerous state courts rejected the notion of giving a prosecutor or judge discretion to discharge a jury in cases where the evidence or the jury seemed unfavorable. As the Court of Appeals of Kentucky explained in 1873,

> If the judge can arbitrarily discharge and impanel juries until one is obtained that will render such a verdict as the state demands, or the attorney for the prosecution desires, and the only protection against such oppression is that a new trial may be ordered in the court trying him, or by the court of last resort, then of what value is [the] boasted right [to be free of double jeopardy]?[31]

By the mid-twentieth century, the majority of states, whether through statute, constitution, or judicial interpretation, had decided that jeopardy attaches either at the point a jury is empanelled or when evidence is introduced.[32] Notably, however, the states remained split as to whether

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[27] Benton v. Maryland, 395 U.S. 784, 794 (1969). Regardless, the Supreme Court did not recognize the Double Jeopardy Clause as incorporated by the Fourteenth Amendment, and thus applicable against the states, until over a century later.

[28] *See* Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1839 (1997).

[29] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 659 (1833).

[30] United States v. Haskell, 26 F. Cas. 207, 212 (Washington, Circuit Justice, C.C.E.D. Pa. 1823) (No. 15,321). United States v. Haskell, 26 Fed.Cas. 207, 212 (No. 15,321) (CC Pa. 1823)

[31] O'Brian v. Commonwealth, 72 Ky. 333, 339 (Ky. 1873). For a similar discussion in a mid-century Iowa case, see State v. Calendine, 8 Iowa 288, 292 (1859).

[32] SIGLER, *supra* note 22, at 84.

jeopardy attached at jury empanelment or at the introduction of evidence. Although by the mid-twentieth century, most jurisdictions placed attachment at empanelment, numerous states, including New York, placed attachment at the introduction of evidence.[33]

Although the Double Jeopardy Clause is silent about when jeopardy attaches, the federal courts moved in relative lock-step with the states and thus discarded Justice Story's more rigid framework. By 1949, the Supreme Court had yet to delineate the exact point at which jeopardy attaches. Although there is no case exactly on point, in *Wade v. Hunter*, the Court first noted that a defendant has a "valued right to have his trial completed by a particular tribunal."[34] Although the Court failed to expound on this right, the right became central to the Court's Double Jeopardy jurisprudence in the coming decades.

B. Enactment of the Uniform Code of Military Justice

Meanwhile, just months before *Wade* was decided, congressional hearings were held on the newly-drafted UCMJ. Although *Wade* would soon settle in the affirmative the question of whether the Double Jeopardy Clause of the Fifth Amendment applied to the military, at the time of the hearings, the issue was in doubt: the Supreme Court had never said one way or another whether the Double Jeopardy Clause applied to the military. Consequently, the draft included Article 44, which forbids prosecution of servicemembers a second time for the same offense.[35]

The *Wade* opinion was issued amidst the hearings.[36] In *Wade*, the convening authority dissolved a battlefield court-martial after introduction of evidence, due to witness unavailability during a rapidly changing tactical situation.[37] When the tactical situation permitted, a

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[33] *Id*. at 85–86.
[34] Wade v. Hunter, 336 U.S. 684, 689 (1949).
[35] Major Daniel J. Everett, *Double, Double Toil and Trouble: An Invitation for Regaining Double Jeopardy Symmetry in Courts-Martial*, ARMY LAW., Apr. 2011, at 15.
[36] *Wade*, 336 U.S. at 685. *Wade* was decided April 25, 1949 while the congressional hearings began March 7, 1949 and ended May 27, 1949; *see Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 669 (1949).
[37] *Id.* at 691–92.

new convening authority re-referred the charges to a new court-martial.[38] The Court held that re-prosecution of Wade did not violate the Double Jeopardy Clause since the court-martial had been dissolved due to manifest necessity.[39] The UCMJ drafters, in an apparent desire to avoid a future repeat of *Wade*, added a third and final clause to Article 44: "A proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article."[40]

In so doing, the drafters explicitly designated the introduction of evidence as the point at which jeopardy attached. This provision, according to the Senate Report on the bill, "represent[s] a substantial strengthening of the rights of an accused."[41] The UCMJ was signed into law in 1950.[42] Article 44's language remains unchanged to this day.[43]

C. The Development of Modern Double Jeopardy Jurisprudence

Seven years after the UCMJ was signed into law, the Supreme Court issued one of the seminal Double Jeopardy opinions that outlined the foundational principles of the Clause.[44] In *Green v. United States*, the Court confronted an issue unrelated to attachment, but the Court's opinion presented the most thorough explanation for the purpose of the Double Jeopardy Clause. The Court explained:

> The underlying idea [of the Double Jeopardy Clause] . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and

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[38] *Id.*
[39] *Id.* at 692.
[40] S. REP. NO. 81-486, at 2244 (1949), *reprinted in* 1950 U.S.C.C.A.N. 2222, 1949 WL 1929.
[41] *Id.*
[42] *See* 64 Stat. 108 (1950) (enacting the UCMJ).
[43] UCMJ art. 44 (1951).
[44] Green v. United States, 355 U.S. 184 (1957).

> insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[45]

The Court went on to reiterate that once a jury has been discharged in the absence of manifest necessity, the Double Jeopardy Clause prevents re-prosecution. "This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears the jury might not convict."[46] Although the Court did not specifically hold that jeopardy attaches at the point of jury empanelment, the Court's holding indicated that the Court was moving in that direction.

In 1963, the Supreme Court first directly confronted the issue of attachment in *Downum v. United States.*[47] Downum had been convicted by a second jury after his first jury had been discharged due to a missing prosecution witness.[48] The jury was discharged immediately after they had been empanelled, and before any evidence had been introduced. The Court held that although no evidence had been introduced, re-prosecution violated the Double Jeopardy Clause. The Court explained, "There is no difference in principle between a discovery by the district attorney immediately after the jury was impaneled that his evidence was insufficient and a discovery after he had called some or all of his witnesses."[49] The dissent argued that although the failure to secure witnesses was potentially negligent, the Court should take a more flexible approach in finding manifest necessity here, since the jury had heard no evidence.[50] The majority rejected this approach and, without explicitly saying so, determined that jeopardy had attached upon the jury being sworn.[51]

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[45] *Id.* at 187–88.
[46] *Id*. at 188.
[47] Downum v. United States, 372 U.S. 734, 736 (1963).
[48] *Id.* at 735.
[49] *Id.* at 737–38.
[50] *Id.* at 741–42 (Clark, J., dissenting).
[51] *Id.* at 737. A decade later, the Court faced the related question of whether jeopardy can attach prior to empanelment, at the pre-trial motion stages. The Court reiterated that, in a jury trial, jeopardy attaches at empanelment and neither before nor after. The Court explained, "When a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain, and embarrassment which attend a trial." Serfass v. United States, 420 U.S. 377, 391 (1975). Thus, again, the Court based its attachment analysis in the defendant's right to avoid expense and embarrassment.

Eight years later, the Court took another step in embracing the defendant's "valued right to have his trial completed by a particular tribunal" that had been explicitly recognized in *Wade* in 1949.[52] In *United States v. Jorn*, the Court confronted a case of an erroneous mistrial, declared by the military judge without the consent of the defendant and without sufficient cause.[53] In overturning the defendant's re-prosecution, the Court began by again recognizing "the heavy personal strain which a criminal trial represents for the individual defendant."[54] Turning to the interest in a particular tribunal, the Court explained why re-prosecution is permissible after a defendant mounts a successful appeal as opposed to re-prosecution after a judge erroneously declares a mistrial: In a case of re-prosecution following appeal by the defendant, "the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal."[55] Later, the Court noted "the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate."[56]

Thus, the Court again built upon the foundational principle referenced in *Wade* that a defendant has an interest in having his case tried by a particular jury.[57]

Although in *Downum* the Court had decided that jeopardy attaches at jury empanelment as a federal rule, the Court had left open the question whether this rule was mandated by the Double Jeopardy Clause of the Fifth Amendment.[58] In 1978, the Court faced this question when a defendant appealed his re-prosecution by the state of Montana.[59] Similar to Article 44, UCMJ, a Montana statute provided that jeopardy did not attach in state courts until the first witness is sworn. Defendant Bretz's first trial had been properly discharged after the jury had been empanelled, but before the first witness had been sworn. Relying on the

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[52] United States v. Jorn, 400 U.S. 470, 480 (1971).
[53] *Id.* at 473.
[54] *Id*. at 479.
[55] *Id*. at 484 (plurality decision).
[56] *Id.* at 486.
[57] A year later, the Court faced a similar case and in dicta declared, "the interest of the defendant in having his fate determined by the jury first impaneled is itself a weighty one." Illinois v. Somerville, 410 U.S. 458, 471 (1972) (citing *Jorn*, 400 U.S. at 470).
[58] Downum v. United States, 372 U.S. 734, 737 (1963).
[59] Crist v. Bretz, 437 U.S. 28 (1978).

Montana double jeopardy statute, the state successfully re-prosecuted Bretz at a later date.[60]

By the time of *Crist*, the Court had already ruled that the Double Jeopardy Clause was binding on the states through the Fourteenth Amendment.[61] In *Crist*, however, the Court had to decide whether the Clause mandated that jeopardy attached at jury empanelment or whether this rule was merely one of expediency binding only on federal courts. The Court held that "[t]he federal rule that jeopardy attaches when the jury is empaneled and sworn is an integral part of the constitutional guarantee against double jeopardy."[62] The Court rejected Montana's argument that the exact point of attachment was "an arbitrarily chosen rule of convenience."[63] To the contrary, the Court hearkened back to the defendant's interest in a chosen jury which, by 1978, had repeatedly been espoused by the Court over the preceding three decades. The Court explained:

> The reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury. . . . It is an interest with roots deep in the historic development of trial by jury in the Anglo-American system of criminal justice. . . . Regardless of its historic origin, however, the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy, since it is that 'right' that lies at the foundation of the federal rule that jeopardy attaches when the jury is empaneled and sworn.[64]

Consequently, Montana's statute that declared jeopardy attached upon the swearing of the first witness was unconstitutional. Bretz's conviction was overturned and all remaining states that had previously failed to adopt the rule of attachment laid down for federal courts were forced to amend their statutes and constitutions to abide by the Court's ruling.

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[60] *Id.* at 29–30.
[61] *See supra* text accompanying note 23.
[62] *Crist*, 437 U.S. at 38.
[63] *Id*. at 37.
[64] *Id*. at 35–36 (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949)).

Whether willfully or by oversight, Congress did not amend Article 44 following the *Crist* opinion. Today's Article 44 is precisely as it was enacted in 1951. Notwithstanding the Court's seemingly unambiguous commands in *Crist*, Article 44(c) still declares, much as Montana's now-overturned statute did, that jeopardy does not attach until evidence is presented.[65] Over three decades after *Crist*, in *Easton*, the inevitable challenge finally arose as to the constitutionality of Article 44's attachment provision.

IV. The Logical Failings of *Easton*

A. A Brief Recap of the *Easton* Dissent

The *Easton* opinion yielded one dissent, whose major points are briefly recounted here and expanded upon in the sections that follow. First, as noted above, the majority placed great weight upon the power of judges and convening authorities to excuse panel members for the proposition that servicemembers lack the same interest in a chosen panel. Yet, as the dissent duly noted, civilian judges also have the authority to excuse jurors.[66] Federal Rule of Criminal Procedure 24(c) provides that when a judge excuses a juror, that juror may be replaced by an alternate juror even in the middle of trial.[67] Furthermore, Rule 23(b)(3) provides that even after a jury has retired to deliberate on findings, the judge still has the authority to excuse a juror, "if the court finds good cause" and the remaining eleven jurors may return a verdict.[68] As the dissent noted, "[i]n this regard, there appears to be little difference between the federal rule and UCMJ provisions."[69]

Of course, as the majority emphasized, in a court-martial, "if excusal of a court-martial member does not reduce the panel below quorum, the defendant is not entitled to an additional member."[70] Yet, as noted, in a civilian trial as well, if a juror is excused during deliberations, the

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[65] UCMJ art. 44 (2012).

[66] United States v. Easton, 71 M.J. 168, 180 n.3 (C.A.A.F. 2012) (Erdmann, J., dissenting) ("Reasons for excusing jurors in federal trials have included: illness, travel plans, family emergency, medical emergencies, emotional instability, and religious holidays.").

[67] FED. R. CRIM. P. 24(c).

[68] *Id.* 23(b)(3).

[69] *Easton*, 71 M.J. at 178 (Erdmann, J., dissenting).

[70] *Id*. at 176 n.10 (Erdmann, J., dissenting).

accused is also not entitled to an additional juror. Furthermore, this difference is also partly due to the differences in jury size between the military and civilian practice. Federal Rule of Criminal Procedure 23(b) provides that juries shall consist of twelve jurors while Articles 16 and 25a of the UCMJ provide that general courts-martial shall consist of no fewer than five members for non-capital cases and no fewer than twelve members for capital cases. However, it is worth noting that the twelve-man jury in civilian practice is not mandated by the Constitution. The Supreme Court has made clear that while twelve-man juries have a deep history in American jurisprudence, the twelve-man "requirement" is "not of constitutional stature."[71] The Court explained, "[t]he performance of [the jury's] role is not a function of the particular number of the body which makes up the jury."[72] Rather than being mandated by the Constitution, Rule 23(b)'s twelve-man requirement was promulgated by the Judicial Conference of the United States pursuant to that body's delegation of power in the Rules Enabling Act.[73] Thus, the difference between the size of civilian juries and military panels is not required by the Constitution.

B. Congressional Intent in Enacting Article 44

At its heart, the *Easton* opinion relies upon deference to Congress's Article I authority, and, more specifically, on the notion that when Congress enacted Article 44(c) of the UCMJ, Congress willfully intended for a different rule from civilian practice. Yet, as noted previously, when the UCMJ was drafted, debated, and enacted from 1949 to 1951, the state of the law of jeopardy attachment was unclear. State courts were split and the Supreme Court had yet to weigh in on the federal side as to when jeopardy attached. Meanwhile, the applicable Article of War was silent as to when jeopardy attached.[74]

In 1948, the Secretary of Defense appointed a committee to draft a uniform code for all Services. The committee, chaired by Harvard Law School professor Edmund Morgan, presented its draft a year later. The committee's draft of Article 44 is virtually identical to the Articles of

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[71] Apodaca v. Oregon, 406 U.S. 404, 406 (1972).
[72] Williams v. Florida, 399 U.S. 78, 100 (1970).
[73] Rules Enabling Act, 28 U.S.C. § 2072 (1990); Peter G. Mccabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1678 (1995).
[74] Article of War 40 (1920).

War double jeopardy provision and the current UCMJ Article, except it lacked the current section (c), the section which, among other things, designates the point of jeopardy attachment as when evidence is introduced.[75] Consequently, the "Morgan Draft" was silent as to when jeopardy attached.

Soon after congressional hearings began, the Supreme Court issued its *Wade* opinion. As explained previously, *Wade* not only upheld re-prosecution of a servicemember where the original charges had been withdrawn under dire circumstances, but it also clarified that the Double Jeopardy Clause of the Fifth Amendment applied to the military. In response to *Wade*, several members of the committee fought to amend Article 44. General Benjamin Franklin Riter, an Army reserve officer in the Judge Advocate General's Corps, testified before the House and Senate.[76] When he testified regarding the proposed Article 44, he noted, derisively, that Article of War 40 had been drafted with the erroneous view that the Double Jeopardy Clause of the Fifth Amendment did not apply to the military.[77] As noted previously, the Morgan Draft of Article 44 of the UCMJ being debated by Congress was virtually identical to Article of War 40. In his testimony to the Senate, General Riter noted that *Wade* had clarified that the Double Jeopardy Clause did in fact apply to the military. General Riter testified, "if I do not leave any impression here this morning other than this, gentlemen, in view of the *Wade* case, . . . we must get rid of that archaic idea that there cannot be jeopardy before verdict."[78]

Similarly, before the House, General Riter railed against Article 44 as drafted and urged for an amendment. Notably, he explained to the House,

> [Article 44] is archaic in the sense that it keeps only "autre fois acquit; autre fois convict"—the old common law idea that there had to be a verdict before jeopardy could attach.

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[75] Committee on a Uniform Code of Military Justice, Uniform Code of Military Justice: Text, References and Commentary (1949).

[76] *Uniform Code of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 168 (1949) [hereinafter *Senate UCMJ Hearings*] (statement of General Franklin Riter). General Riter was introduced as the department commander of the American Legion of Utah.

[77] *Id.*

[78] *Id*. at 170.

> That is, a man had to be acquitted or he had to be convicted before he could plead [double jeopardy]. We know that that is not the law under the Fifth Amendment today—that jeopardy can attach in our civil courts *as soon as the jury is sworn and the first witness sworn*.[79]

General Riter's testimony highlights once again that when the UCMJ was drafted, the Supreme Court had yet to clarify the precise point at when jeopardy attaches. Many civilian jurisdictions still permitted jeopardy to attach after the first witness was sworn, as opposed to when the jury was sworn. Before the Senate, General Riter testified that as a result of *Wade*, "[t]he new article must recognize that jeopardy may attach before findings and that the doctrine of 'imperious necessity' is now part of the military law."[80] Similarly, Felix Larkin, the Assistant General Counsel to the Secretary of Defense, testified "double jeopardy obtains or applies or starts, if you will, in many civil jurisdictions *either* when the jury is sworn or the first witness is heard, and from then on the man is in jeopardy."[81]

Furthermore, the primary basis for General Riter's recommendation that Article 44 be amended was the *Wade* case. In his House testimony, he declared that Article 44 "must go, because the day before yesterday there was argued in the Supreme Court, just a few blocks down the street here, the famous *Wade* case."[82] *Wade* was not a case that turned on whether jeopardy attached at empanelment or at the introduction of evidence, although it did make clear that jeopardy attached in a court-martial at least after the introduction of evidence. Instead, *Wade* turned on whether manifest necessity existed for the convening authority to dismiss the first court-martial. General Riter explained to the Senate that Article 44 as drafted could lead convening authorities to the mistaken conclusion that they could withdraw charges at any point prior to findings and double jeopardy would not be implicated.[83] Consequently,

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[79] *Uniform Code of Military Justice: Hearing on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 669 (1949) [hereinafter *House UCMJ Hearings*] (statement of General Franklin Riter) (emphasis added).

[80] *Senate UCMJ Hearings*, *supra* note 76, at 186 (statement of General Riter).

[81] *Id.* at 322 (statement of Felix Larkin) (emphasis added).

[82] *House UCMJ Hearings*, *supra* note 79, at 669 (statement of General Riter).

[83] *Senate UCMJ Hearings*, *supra* note 76, at 186. General Riter noted that prior to *Wade*, "[t]here always existed the temptation for an appointing authority to withdraw a charge when he learned that the prosecution was going to fail in his case." *Id.*

he fought to amend Article 44 to put military law in conformity with civilian law, specifically the *Wade* opinion.

Later, before the Senate Armed Services Committee, the chair of the drafting committee, Edmund Morgan, held an extended exchange with the committee regarding Article 44.[84] Not surprisingly, they never discussed whether jeopardy should attach at empanelment or at the introduction of evidence.[85] Again, it would be another two decades before the Supreme Court held that the point of attachment was a constitutional matter. *Wade* merely clarified that jeopardy attached before findings. Consequently, the discussion centered on ensuring that Professor Morgan and his drafting committee would re-draft Article 44 to align it with the holding in *Wade*. As in General Riter's testimony, the committee repeatedly expressed concern for deterring convening authorities and prosecutors from dismissing charges in the middle of trial, thinking that they could re-prosecute at a later date, except in cases of true manifest necessity.[86] After a lengthy discussion regarding *Wade* and automatic appeals, Senator Kefauver instructed Professor Morgan to re-draft Article 44 "to [put] in that extra protection in one way or another."[87] After a brief exchange, Professor Morgan closed the discussion on Article 44 by remarking, "I really am just as anxious as you Senators are to have the double jeopardy clause apply, and apply the way it does in civil courts."[88]

The majority opinion in *Easton* declares, "Congress was purposeful in selecting the point at which jeopardy attaches."[89] Clearly, however, the House and Senate hearings on the UCMJ support the opposite conclusion. Not once during countless extended debates on Article 44 did the participants debate whether jeopardy should attach at jury empanelment or at the introduction of evidence. As noted, both General Riter and Felix Larkin explained to the committee that in "civil" practice, jeopardy attaches either at empanelment or the introduction of evidence.

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[84] *Id.* at 323.
[85] *Id.*
[86] *Id*. As the Subcommittee Chairman, Senator Estes Kefauver explained, "If they go to trial, and then the prosecuting attorney finds that he probably did not have as good a case as he thought he had, and he gets the case postponed, or deferred, or something or other, or whatnot, I think double jeopardy ought to apply." *Id.* (statement of Sen. Estes Kefauver).
[87] *Id.* at 325.
[88] *Id*. at 324 (statement of Prof. Edmund Morgan).
[89] United States v. Easton, 71 M.J. 168, 176 (C.A.A.F. 2012).

Essentially, their testimony indicated to the committee that *either* would be fine; so long as Article 44 was amended to clarify that convening authorities could not simply terminate a proceeding mid-trial, the article would be in conformity with *Wade*. Rather than concerning themselves with whether jeopardy attaches at empanelment or at introduction of evidence, the senators, representatives, and the drafting committee expressed concern for ensuring that Article 44's double jeopardy provision would operate in conformity with civilian practice.[90] Article 44(c)'s phrase "after the introduction of evidence" is little more than a reflection of what the drafters believed to be the state of the law in civilian court at the time.

C. *Easton*'s Structural Argument

For its conclusion that "Congress was purposeful" in selecting the point of attachment at the introduction of evidence, the majority also relied on other articles of the UCMJ. The majority concluded that various articles and Rules for Courts-Martial taken together demonstrated congressional intent. The majority concluded that applying *Crist* to the military "would negate numerous portions of the UCMJ."[91]

First, the CAAF offered Article 29, discussed previously, as an article "which only function[s] properly if the Article 44, UCMJ, standard for jeopardy is applied."[92] Yet, as discussed earlier, federal courts have similar powers as those provided to military judges in Article 29. It is unclear how Article 29 would function any differently if jeopardy attached at jury empanelment. Whether at voir dire or during the middle of trial, military judges, like federal judges, can excuse a member for good cause.

Second, the court offered Article 16 of the UCMJ to support its structural argument. Article 16 authorized three-member special courts-martial without a military judge. Since the members are sworn before arraignment, the majority concludes that "[s]uch a panel could not properly function if jeopardy attached when members were sworn since

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[90] *See Senate UCMJ Hearings*, *supra* note 76, at 323.
[91] *Easton*, 71 M.J. at 175.
[92] *Id.* at 176.

they would not be able to perform any duties without jeopardy attaching."[93]

The dissent simply ignored this argument, in all likelihood due to its obvious weakness. The issue presented to the court was not a court-martial of this obscure variety. In such a court-martial, the "members" also operate as the military judge.[94] The majority first assumed that complying with *Crist* would automatically mean that jeopardy would attach when the three quasi-military judge-members are first sworn.[95] Again, this is a novel question that a court should consider when such a case arises; unlike normal general and special courts-martial, this type of court is both rare and unique in that the panel also fills the role of military judge. Second, the court concluded, if jeopardy *did* attach when the three members were sworn, "the panel could not properly function."[96] It is unclear why the panel could not properly function. Certainly, there would be a much greater price to dismissing the court, since jeopardy would have attached. But this would have no bearing on whether the panel could function. In summary, three-member courts-martial, in the unlikely event that one will be held in the next decade, could function just fine under the *Crist* rule.

Finally, the majority concludes that complying with *Crist* would also require undermining the President's authority as Commander in Chief, since it would "negate application of certain rules established by the [Manual for Courts-Martial]."[97] In support of this proposition, the majority only offers the example of a single rule, namely Rule for Courts-Martial (RCM) 604(b): "'[c]harges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.'" Of course, this RCM merely restates Article 44(c) in the language of manifest necessity. It is not, as the court seems to suggest, an independently-operating rule issued under the President's Article II authority that would be negated. Certainly, abiding by *Crist* would require amending the RCM, but only because it is a restatement of the UCMJ article in question.

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[93] *Id*.
[94] UCMJ art. 16(2)(A) (2012).
[95] *Easton*, 71 M.J. at 176.
[96] *Id.*
[97] *Id* (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 604(b) (2012) [hereinafter MCM]).

D. The Servicemember's Interest in a Particular Tribunal

The ultimate failure of *Easton* is that the opinion failed to even consider the logical underpinnings for a defendant's interest in a particular tribunal. Instead, the court discarded the interest out of hand simply by arguing that Congress and the President did not intend for servicemembers to have that interest. The preceding paragraphs have shown why that is erroneous. The drafters' priority was ensuring the military's double jeopardy clause operated the same as the Double Jeopardy Clause of the Fifth Amendment. At the time of the drafting, the Supreme Court had yet to expound upon a defendant's interest in a particular tribunal.

In the decades following enactment of the UCMJ, the Court explained time and again that a defendant's interest in a particular tribunal is inextricably tied to the other fundamental interests protected by the Double Jeopardy Clause: (1) guarding the defendant from unnecessary "embarrassment, expense, anxiety and insecurity"; and (2) preventing the state from unfairly testing its case and dismissing it when the case looks unpromising. Regarding the latter interest, the Court's attachment rule prevents the state from empaneling a jury, then dismissing it in hopes of obtaining a more favorable one. Regarding the former, more fundamental interest, the connections between the interest in a particular jury and the purpose of the Clause are myriad. First, empaneling a jury consumes time and expense. Once sworn, the *Crist* rule prevents prosecutors from starting the process over, thus subjecting the defendant to days more of the process and days more of anxiety and expense. Second, once a jury is empaneled, the jury is at that point sitting in judgment of the defendant. Although the U.S. system values the principle of innocence until proven guilty, facing a jury of one's peers for the first time standing accused of a crime is perhaps the most dramatic point of "embarrassment" and "anxiety" for an accused. The *Crist* rule fulfills the fundamental purpose of the Clause by ensuring that, absent remarkable circumstances, an accused has to experience this only once. Prior to *Crist*, prosecutors could empanel ten juries in a single case without violating the Clause, even though this would subject the defendant to significant unnecessary embarrassment and anxiety.

Although it is easy to get sidetracked by the differences between military and civilian law, two legal propositions remain: (1) the Double Jeopardy Clause applies to the military; and (2) the purpose of the Clause is to protect defendants from the embarrassment, expense, anxiety, and

insecurity from multiple trials. As explained, the *Crist* rule helps fulfill the second prong. In the military context, servicemembers accused of crimes undoubtedly feel the same embarrassment, anxiety, and insecurity as their civilian counterparts do. In fact, it is likely that their interest in a particular jury is *greater* than that of a civilian defendant because of the nature of military society. Military panels are typically culled from the same installation as the defendant, and usually from the same unit.[98] Unlike in the civilian context, it is common for military defendants to routinely cross-paths with the men and women who sat in judgment of them. Furthermore, unlike civilian juries, military members are from the same profession and are senior in rank to the defendant.[99] Unlike civilian defendants, military defendants face the added anxiety and embarrassment of knowing that the men and women who compose their panel could someday be their boss, or at least, be a colleague of a future boss. In the insular world of the military, military defendants must fear the loss of reputation incident to standing accused of a crime to a degree unknown to civilian defendants.[100] A military defendant is likely to face a greater degree of embarrassment and anxiety than a civilian facing multiple panels.

V. Conclusion

As noted previously, the Supreme Court denied Easton's petition for a writ of certiorari.[101] In all likelihood, the Supreme Court recognized that it had no good options. The Court could uphold the opinion and thus sanction a lower court's refusal to follow unambiguous Court precedent. The Court could overrule *Crist*, which has stood for over three decades. Finally, the Court could rule an act of Congress unconstitutional. None of these options would be particularly appealing to the Court. Consequently, *Easton* remains "good law."

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[98] Rule for Courts-Martial 503 prevents detailing members of the "same unit" as the accused, but per Article 25(c)(2) of the UCMJ, this refers to a company-level command; instead, members may typically be detailed from the next higher subdivision. MCM, *supra* note 97, R.C.M. 503.

[99] *Id.* R.C.M. 503(a)(1).

[100] Consider as a hypothetical a career employee of, say, United Parcel Service (UPS) who is accused of a crime. Clearly, his embarrassment would be greater if his panel were composed of other career employees of UPS in his region rather than random men and women from all walks of life.

[101] *See supra* note 7.

Regardless, the glaring problems with the opinion remain. In order to rescue a provision of the UCMJ, the Court went to great lengths to justify ignoring *Crist*. The Court relied on a dubious conclusion that Congress intended for a different rule from civilian courts to reach the conclusion that *Crist* need not apply since the military is different. The military *is* different, but, as explained, the evils guarded against by the Double Jeopardy Clause are just as great, if not greater, in the military context. *Easton* is dangerous not because military prosecutors are going to routinely dismiss panels. *Easton* is dangerous because it dispensed so effortlessly with an "integral" part of a fundamental constitutional right.

U.S. *AD BELLUM*: LAW AND LEGITIMACY IN UNITED STATES USE OF FORCE DECISIONS

MAJOR DONALD L. POTTS

I. Introduction

The United Nations (UN) was created in 1945[1] in part to "save succeeding generations from the scourge of war"[2] and to regulate the threat or use of force among nations.[3] It has failed on both counts.[4] Although virtually every nation on Earth is a member of the UN[5] and has therefore pledged to "refrain in their international relations from the

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[1] *UN at a Glance*, http://www.un.org/en/aboutun/index.shtml (last visited May 19, 2014); JOHN F. MURPHY, THE UNITED NATIONS AND THE CONTROL OF INTERNATIONAL VIOLENCE: A LEGAL AND POLITICAL ANALYSIS 11 (1982).

[2] U.N. Charter pmbl.

[3] *Id.* art. 2, para. 4; Press Release, Secretary-General, Secretary-General Says Renewal of Effectiveness and Relevance of Security Council Must Be Cornerstone of Efforts to Promote International Peace in Next Century, U.N. Press Release SG/SM/6997 (May 18, 1999) [hereinafter Secretary-General Press Release].

[4] Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16, 22 ("Since 1945, so many states have used armed force on so many occasions, in flagrant violation of the charter, that the regime can only be said to have collapsed."); Press Release, United States Dep't of State, Statement by the Honorable John Foster Dulles Sec'y of State Before the Charter Review Subcomm. of the Senate Foreign Relations Comm. (Jan. 18, 1954), history.state.gov/historicaldocuments/frus1952-54v03/d47.

[5] The UN has 193 member states. UN AT A GLANCE, http://www.un.org/en/aboutun/index.shtml (last visited Feb. 17, 2014).

threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations,"[6] history is replete with examples of member states threatening and using force against each other.[7] Similarly, the UN Security Council, which is supposed to be the "sole source of legitimacy on the use of force,"[8] has consistently shown itself impotent to carry out its principal responsibility.[9]

The United States not only is a signatory to the Charter, but also was it a driving force behind the creation of the UN.[10] Nonetheless, the United States has acted contrary to the requirements and restrictions of the UN Charter on several occasions. Whether this is a cause or an effect of the Charter's impotence is beyond the scope of this article.

In the absence of an effective UN Charter framework, the United States has acted on certain principles in determining when the use of armed force is appropriate. These principles are based in domestic and international law but are not purely legal matters. Rather, the appropriate standard used to evaluate use of force decisions is not whether they are legal but whether they are legitimate.[11] This article identifies the factors that U.S. decision-makers consider in deciding whether the use of force is appropriate.

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[6] U.N. Charter art. 2, para. 4.

[7] MEREDITH REID SARKEES & FRANK WHELON WAYMAN, RESORT TO WAR: A DATA GUIDE TO INTER-STATE, EXTRA-STATE, INTRA-STATE, AND NON-STATE WARS, 1816–2007, at 76–77 (2010); RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2012 (2012).

[8] Secretary-General Press Release, *supra* note 3.

[9] Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VAND. J. TRANSNAT'L L. 643, 644–47 (2007); W. Michael Reisman, *Article 2(4): The Use of Force in Contemporary International Law*, *in The United Nations Charter and the Use of Force: Is Article 2(4) Still Workable?*, 78 AM. SOC'Y INT'L L. PROC. 68, 77 (1984).

[10] Wilhelm G. Grewe & Daniel-Erasmus Khan, *Drafting History*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1–12 (Bruno Simma et al., eds., 2d ed. 2002); Robert Kagan, *America's Crisis of Legitimacy*, FOREIGN AFF., Mar./Apr. 2004, at 65, 79 ("Despite its role in helping to create the UN and draft the UN Charter, the United States has never fully accepted the organization's legitimacy or the charter's doctrine of sovereign equality.").

[11] John F. Troxell, *Military Power and the Use of Force*, *in* U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY POLICY AND STRATEGY 217, 234 (J. Boone Bartholomees, Jr., ed., 2d ed. 2006) ("[D]emocracies have the unique challenge of dealing with the elusive and malleable concept of legitimacy . . . Today, more than ever, the key question concerning the use of force is not whether it is lawful, but whether it is wise.").

Part II of this article briefly discusses the legal regime established by the UN Charter to regulate the threat or use of force in international relations and suggests critical reasons for the Charter's failure to live up to its promise. This will establish a baseline to evaluate when and how far the United States strays from the Charter rules. Part III surveys and analyzes U.S. policy and practice since 1945 regarding the use of military force. Part IV distills the past practice and policy pronouncements into general principles on which the United States relies in making the decision whether to use force in international relations. The article concludes that there is no practical legal obstacle to the United States' use of force, and that if the United States can justify the use of force as legitimate, it will use force regardless of its legality.

II. The United Nations and Regulation of the Use of Force

The UN Charter contains a comprehensive regime intended to prevent the use of force and, when prevention fails, to regulate the use of force in international relations. In fact, prevention and regulation of the use of force among nations were primary purposes for the creation of the UN. The Charter's preamble "highlight[s] some of the motivations of the [UN's] founders,"[12] including

> to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, . . . and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest . . . .[13]

Similarly, the first purpose of the UN is maintenance of "international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace."[14]

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[12] Rüdiger Wolfrum, *Preamble*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 37.
[13] U.N. Charter pmbl.
[14] *Id.* art. 1, para. 1.

A. Article 2(4)

Article 2(4) is the cornerstone of the Charter's regulation of the use of force.[15] It states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."[16] The language in Article 2(4) is expansive, barring not only the use of force (as opposed to the more narrow prohibition of "war" in the Kellog-Briand Pact[17]) but also the mere threat of force. This broad prohibition on the use or threat of force establishes the general rule, subject to two exceptions contained in the Charter: Security Council authorization for the use of force and self-defense.[18]

B. Security Council Regulation of the Threat or Use of Force

The UN Security Council has the "primary responsibility for the maintenance of international peace and security."[19] Chapter VII of the UN Charter governs the Security Council's authority to address "threat[s] to the peace, breach[es] of the peace, or act[s] of aggression."[20] When the Security Council determines that a threat to the peace, breach of the peace, or act of aggression has occurred, it has three options available to assist in the "maint[enance] and restor[ation of] international peace and security."[21]

First, the Security Council can recommend that the parties to a dispute "comply with such provisional measures as [the Security Council] deems necessary."[22] These measures may include "suspension

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[15] Albrecht Randelzhofer, *Article 2(4)*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 117.
[16] U.N. Charter art. 2, para. 4.
[17] General Treaty for Renunciation of War as an Instrument of National Policy Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. Fifteen nations signed the treaty, which "condemn[ed] recourse to war for the solution of international controversies, and renounce[d] it as an instrument of national policy in their relations with one another."). *Id.*
[18] Michael J. Glennon, *The Rise and Fall of the U.N. Charter's Use of Force Rules*, 27 HASTINGS INT'L & COMP. L. REV. 497, 506 (2004).
[19] U.N. Charter art. 24, para. 1.
[20] *Id.* art. 39.
[21] *Id.*
[22] *Id.* art. 40.

of hostilities, troop withdrawal, and the conclusion of or adherence to a truce."[23] Second, the Security Council can impose sanctions on a party determined to have threatened or breached the peace or to have committed an act of aggression.[24] Finally, pursuant to Article 42, the Security Council can authorize the use of force to "maintain or restore international peace and security."[25]

Originally, the Security Council was expected to enforce Article 42 resolutions with a military force consisting of units placed at its disposal by member states in accordance with a "special agreement or arrangement."[26] However, these agreements or arrangements were never concluded, and as a result, the only method by which the Security Council can enforce an Article 42 resolution is by voluntary action of member states.[27] With Security Council approval, therefore, nations may be authorized to threaten or to use force that would otherwise violate Article 2(4).

In addition to the substantive powers of the Security Council, its composition and procedures play a significant part in its regulation of the use of force. The Security Council is comprised of fifteen member states.[28] Ten are elected from the member states of the UN and five are permanent members of the Security Council.[29] Any Security Council action other than procedural matters requires the affirmative vote of at least nine members, but any one of the permanent members can veto any non-procedural action.[30] As a result, it is practically impossible for the Security Council to adopt a resolution authorizing the use of force against a permanent member, criticizing the actions of a permanent member, or in any way contrary to the interests of a permanent member.[31]

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[23] Jochen Abr. Frowein & Nico Krisch, *Article 40*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 732.
[24] U.N. Charter art. 41.
[25] *Id.* art. 42.
[26] *Id.* art. 43, para. 1.
[27] Jochen Abr. Frowein & Nico Krisch, *Article 42*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 732.
[28] U.N. Charter art. 23.
[29] *Id*.
[30] *Id.* art. 27.
[31] A notable exception was the Security Council's authorization to use force in response to the North Korean invasion of South Korea. China was still represented on the Council by the Republic of China. The Soviet Union was boycotting the Security Council to protest its refusal to recognize the People's Republic of China as the legitimate

C. Self-Defense

Another exception to Article 2(4)'s general prohibition on the threat or use of force is action taken in self-defense.[32] Article 51 of the Charter protects the "inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations."[33] However, self-defense is only authorized by the Charter "until the Security Council has taken measures necessary to maintain international peace and security," and any Member exercising self-defense must immediately report its actions to the Security Council.[34]

Article 51's scope is a matter of great disagreement. Some scholars argue that the term "inherent right" suggests that nations have a right to self-defense, including anticipatory self-defense, that predates the Charter and is not substantially affected by the Charter.[35] Others claim that the textual prerequisite of an "armed attack" negates the pre-Charter right of anticipatory self-defense and requires a nation to wait until an armed attack actually occurs before responding in self-defense.[36]

D. Regional Arrangements of Agencies

The Charter recognizes a role for other international organizations such as NATO and similar bodies in the maintenance of international peace and security. Chapter VIII of the Charter addresses the use of "regional arrangements or agencies" to maintain international peace and security.[37] Although Chapter VIII provides recognition of the

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government of China. As a result, only the United States, United Kingdom, France, or the then-named Republic of China could veto the resolution, and none did. The Soviet Union quickly realized its tactical error and resumed its seat on the Council. Anthony Clark Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT'L L. 1, 7 (1990).

[32] U.N. Charter art. 51.

[33] *Id.*

[34] *Id.*

[35] Major John J. Merriam, *Natural Law and Self-Defense*, MIL. L. REV. 43, 65–66 (Winter 2010); William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1375–77 (2004).

[36] Albrecht Randelzhofer, *Article 51*, *in* THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, *supra* note 10, at 792–94; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 272–73 (1963).

[37] U.N. Charter art. 52, para. 1.

contribution that regional agencies can make to international peace and security, it prohibits them from taking any enforcement action without Security Council approval.[38] Therefore, it is not actually an exception to the Article 2(4) prohibition on the threat or use of force. Rather, regional enforcement actions are a subset of the Security Council's Article 42 power to authorize the use of force.

E. United Nations' Effectiveness in Regulating the Use of Force

The UN has failed to prevent and effectively to regulate the threat or use of force in international relations for two primary reasons. First, nations have not acted as though the Charter is binding law. Nations, including the United States, frequently violate the Charter without sanction and, in some cases, with approval of the international community. When the stakes are sufficiently high, a nation will act in its own interest, even if that action violates the Charter.[39]

Second, the structure and procedure of the Security Council, specifically the so-called veto power of the permanent members,[40] prevents the Council from taking effective action that is contrary to the interests of one or more of the permanent members.[41] The early expectation that the permanent members, who cooperated during World War II, would continue to cooperate in the post-war world proved to be unrealistic. Security Council dysfunction was at its zenith during the cold war years, saw a brief respite during the early 1990s,[42] but then resurged as other permanent members, particularly Russia, China, and France, sought to rein in the power of the United States.[43]

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[38] *Id.* art. 53, para. 1.

[39] Glennon, *supra* note 18, at 499 ("[W[hen the individual interest of the state is at odds with the collective interest, states choose their own national interest over the collective interest.").

[40] U.N. Charter art. 27, para. 3 ("Decisions of the Security Council on [non-procedural] matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . . .").

[41] MURPHY, *supra* note 1, at 21; Press Release, United States Dep't of State, Statement by the Honorable John Foster Dulles Sec'y of State Before the Charter Review Subcomm. of the Senate Foreign Relations Comm. (Jan. 18, 1954).

[42] Troxell, *supra* note 11, at 232.

[43] Glennon, *supra* note 4, at 18–19 ("Reactions to the United States' gradual ascent to towering preeminence have been predictable: coalitions of competitors have emerged. Since the end of the Cold War, the French, the Chinese, and the Russians have sought to return the world to a more balanced system.").

The UN, and the Security Council in particular, was intended to have established a legal framework upon which nations could rely in determining whether the use of force was appropriate. Because they have failed, nations have had to look elsewhere for legal guidance in making these decisions.

III. The United States' Justification for the Use of Force

The decision to use military force is one of the most serious and most complicated decisions an administration faces.[44] It requires consideration of international and domestic law and policy.

No administration has ever published an exhaustive, or even reasonably detailed, explanation of what circumstances would cause the United States to use force in its international relations.[45] Policymakers, including those who make the decision to use military force, have no crystal ball and cannot foresee every circumstance that might justify the use of force.[46] Therefore, when they do pronounce policy regarding the potential use of force, they tend to be vague and leave abundant room for interpretation.

For example, for decades before September 11, 2001, the United States treated international terrorism as a criminal matter rather than a matter of war.[47] The scale of the September 11 attacks caused the U.S. government to change its policy and treat international terrorism, at least in some respects, as a matter of armed conflict justifying the use of military force.[48] Similarly, prior to the Korean War, the United States had declared an Asian "defense perimeter" identifying those Asian

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[44] GEORGE W. BUSH, DECISION POINTS 184 (2010); Troxell, *supra* note 11, at 225.

[45] Troxell, *supra* note 11, at 234 ("there can be no single or simple set of fixed rules for the use of force, the prudent strategist needs to keep in mind relevant questions and issues he should evaluate in each particular circumstance that might require military force.").

[46] President George H.W. Bush, Remarks at the United States Military Academy in West Point, New York, 2 PUB. PAPERS 2230 (Jan. 5, 1993) ("I know that many people would like to find some formula, some easy formula to apply, to tell us with precision when and where to intervene with force. Anyone looking for scientific certitude is in for a disappointment. In the complex new world we are entering, there can be no single or simple set of fixed rules for using force. Inevitably, the question of military intervention requires judgment. Each and every case is unique.").

[47] JENNIFER ELSEA, CONG. RESEARCH SERV., RL 31191, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 1 (2001).

[48] *Id.*

nations that were important to U.S. national security.[49] The declared perimeter did not include South Korea.[50] After North Korea invaded South Korea, the United States quickly reoriented its priorities to make clear that the defense of South Korea was a vital national security interest.[51]

Because there is no comprehensive "checklist" that enumerates the circumstances in which the United States will use force, to discern the United States' understanding of the limits of its authority to use force requires analysis of U.S. policy and practice. The remainder of this Part will analyze the history of use of force policy and decisions since the implementation of the UN Charter to determine the contours of the United States' understanding of *jus ad bellum*, and is organized in three sections: the Cold War Period (roughly 1945 through the Reagan Administration), the Post-Cold War Period (roughly 1989 through September 10, 2001), and the Post-9/11 Period (September 11, 2001, through the present).

A. Cold War

The Cold War was a period of constant tension between the United States and the West, on one hand, and the Soviet Union and the East, on the other.[52] Militarily, this period was characterized by proxy wars with only occasional direct confrontations between the United States and the Soviet Union, all taking place under the shadow of potential nuclear war.[53]

U.S. foreign policy in the early part of the Cold War centered around the doctrine of containment.[54] Containment was a doctrine that

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[49] Dean Acheson, U.S. Sec'y of State, Address to the National Press Club (Jan. 12, 1950), http://teachingamericanhistory.org/library/document/speech-on-the-far-east/.

[50] *Id.*

[51] U.S. Dep't of State, *Authority of the President to Repel the Attack in Korea*, DEP'T ST. BULL., July 31, 1950, at 173, 176–77. The United States framed its "paramount" interest as "[t]he continued existence of the United Nations as an effective international organization" and justified the use of force in Korea on North Korea's violation of Security Council resolutions. *Id.*

[52] WILLIAM G. HYLAND, THE COLD WAR IS OVER 7–10 (1990).

[53] W. Michael Reisman, *International Law After the Cold War*, 84 AM. J. INT'L L. 859, 859–60 (1990).

[54] Memorandum from Clark Clifford, Special Counsel to the President, to President Harry S. Truman, American Relations with the Soviet Union: A Report to the President

employed all aspects of foreign policy, including military force, to prevent the spread of communism.[55]

1. Korea

On June 25, 1950, North Korean armed forces crossed the 38th Parallel, the dividing line with South Korea, and began swiftly pushing back South Korean defenders.[56] North Korean forces entered the South Korean capital of Seoul on June 28, and South Korean soldiers "withdrew in disorder and abandoned most of their equipment."[57]

On June 25, the UN Security Council met to consider the North Korean invasion and adopted Resolution 82, which condemned the action as a "breach of the peace" and "[called] upon the authorities of North Korea to withdraw forthwith their armed forces to the 38th parallel."[58] When North Korea did not comply with Resolution 82, the Security Council adopted Resolution 83, calling on member states to provide military assistance to South Korea to "repel the armed attack and to restore international peace and security in the area."[59] The United States committed armed forces to the defense of South Korea along with other nations that responded to the Security Council's call for assistance.[60]

UN Security Council resolutions, particularly Resolution 83, provided the United States with a firm justification in international law for its use of armed force. The existence of a coalition of more than twenty nations cooperating in the fight added legitimacy to the action as well.[61]

Domestically, President Truman did not seek a congressional declaration of war or authorization to commit the armed forces to combat

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by the Special Counsel to the President 71–79 (Sept. 24, 1946), http://www.trumanlibrary.org/4-1.pdf.

[55] *Id*. at 73.

[56] 2 UNITED STATES ARMY, AMERICAN MILITARY HISTORY 223 (Richard W. Stewart ed., 2d ed. 2009).

[57] *Id.*

[58] S.C. Res. 82, ¶ 6, U.N. Doc. S/RES/82 (June 25, 1950).

[59] S.C. Res. 83, ¶ 6, U.N. Doc. S/RES/83 (June 27, 1950).

[60] MURPHY, *supra* note 1, at 30; 2 UNITED STATES ARMY, *supra* note 56, at 224.

[61] 2 UNITED STATES ARMY, *supra* note 56, at 228.

in Korea. Congress neither authorized nor prohibited U.S. military involvement in the war.[62] Truman determined that "[t]he continued existence of the United Nations as an effective international organization [was] a paramount United States interest."[63]

The UN reaction to the North Korean invasion of South Korea was an early, but short-lived, success for the Security Council. When the conflict erupted, the Soviet Union was boycotting the Security Council because China was represented by the Republic of China rather than the communist People's Republic of China.[64] Due to the Soviet Union's absence and the nature of the Chinese representation, the Security Council unanimously condemned the North Korean invasion.[65] After the Soviet Union returned to the table and the People's Republic of China took China's seat on the Security Council, East-West tensions dominated the Security Council's actions through the Cold War period.

2. Cuban Missile Crisis

In October of 1962, the United States learned that the Soviet Union was deploying nuclear missiles in Cuba, ninety miles from the Florida coast.[66] In response, the United States demanded that the Soviet Union remove the missiles and, on October 24, instituted a naval quarantine to prevent offensive weapons from reaching Cuba.[67]

President Kennedy's advisers discussed justifying the quarantine as an act of anticipatory self-defense under Article 51 of the UN Charter, but they ultimately determined that they could not characterize the threat

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[62] James P. Terry, *The President As Commander in Chief*, 7 AVE MARIA L. REV. 391, 406 (2009).
[63] *Authority of the President to Repel the Attack in Korea*, *supra* note 51, at 176.
[64] DEAN ACHESON, THE KOREAN WAR 18–19 (1971).
[65] S.C. Res. 82, *supra* note 58.
[66] ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 19 (1968); Hakimi, *supra* note 9, at 654.
[67] KENNEDY, *supra* note 66, at 52. Although sometimes referred to as a "blockade," the term "quarantine" was deliberately chosen because a blockade is an act of war. Richard N. Gardner, *A Life in International Law and Diplomacy*, 44 COLOM. J. TRANSNAT'L L. 1, 6 (2005) ("[W]e don't want a war, and that's why we're not calling it a blockade, but only a quarantine for a very limited purpose.").

of "armed attack" as imminent.[68] They settled on justifying the quarantine as a regional enforcement action by the Organization of American States (OAS) under Chapter VIII of the UN Charter.[69] As discussed in Part II.D. above, however, Chapter VIII actions still require Security Council approval. In addition to approving the quarantine, three OAS nations, Argentina, the Dominican Republic, and Venezuela, actively participated in enforcing the quarantine, and several other OAS nations provided port facilities.[70]

On October 22, the United States requested a meeting of the UN Security Council to address the situation and proposed a draft resolution calling for the removal of the missiles from Cuba.[71] The Cuban and Soviet ambassadors also sought assistance from the Security Council, and the Soviet Union also proposed a draft resolution condemning the United States and insisting that it end the quarantine.[72] Because the United States and the Soviet Union were both permanent members of the Security Council with veto power, there was little possibility that any resolution of the Cuban missile crisis would come out of that body and, in fact, the Security Council never took official action regarding the Cuban Missile Crisis.[73]

3. Vietnam

In the mid-1950s, the United States began providing military advisors and assistance to the Republic of Vietnam, which was fighting a counterinsurgency war against communist guerillas.[74] This was part of President Eisenhower's "domino theory" of containment: "You have a row of dominoes set up, you knock over the first one, and what will happen to the last one is the certainty that it will go over very quickly."[75] Vietnam was the first domino in the analogy, and Eisenhower

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[68] James E. Hickey, Jr., *Challenges to Security Council Monopoly Over the Use of Force in Enforcement Actions: The Case of Regional Arrangements*, 10 IUS GENTIUM 77, 101 (2004).
[69] *Id*. at 102.
[70] *Id.* at 106.
[71] U.N. S.C. Rep. of the Security Council, July 16 1962–July 15 1963, U.N. Doc. A/5502; GAOR, 18th Sess., Supp. No. 2 (1963).
[72] *Id*.
[73] *Id.*; Hickey, *supra* note 68, at 107.
[74] 2 UNITED STATES ARMY, *supra* note 56, at 293.
[75] President Dwight D. Eisenhower, Remarks at Presidential Press Conference (Apr. 7, 1954), *quoted in* STEPHEN E. AMBROSE, EISENHOWER: THE PRESIDENT 180 (1984).

determined that, if communist expansion was not stopped there it would continue unchecked in neighboring countries and become more difficult to stop.[76]

The United States continued a limited involvement in Vietnam through the Eisenhower and Kennedy administrations, although that involvement increased in numbers of personnel and scope of action. By 1964, under President Johnson, nearly 24,000 U.S. military personnel were in Vietnam, up from under 700 in 1960.[77] During this period, U.S. military operations were geographically limited to South Vietnam because the legal basis for U.S. involvement was a request by the government of the Republic of Vietnam to the United States for assistance in fighting the insurgents. The United States had justified its actions as a matter of collective self-defense under Article 51 of the UN Charter.[78]

On August 2, 1964, torpedo boats of the North Vietnamese Navy attacked the U.S. destroyer USS *Maddox* in international waters.[79] In response to President Johnson's request, Congress passed a joint resolution authorizing the use of military force.[80] Known as the "Tonkin Gulf Resolution" after the location of the naval clash that led to its passage, the resolution authorized the President to "take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression" and to "take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.[81] As a matter of international law, the United States continued to invoke collective self-defense under Article 51 of the UN Charter.[82]

As the war dragged on and congressional and the American public support diminished, Congress passed further legislation limiting the

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[76] *Id.*
[77] 2 UNITED STATES ARMY, *supra* note 56, at 301.
[78] U.S. Dep't of State, *The Legality of the United States Participation in the Defense of Viet Nam*, 75 YALE L.J. 1085, 1094 (1966).
[79] MICHAEL MACLEAR, THE TEN THOUSAND DAY WAR: VIETNAM, 1945–1975, at 111 (1981). There were initial reports of a second attack on August 4, but it was ultimately determined that the second attack did not occur. *Id.*
[80] Tonkin Gulf Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964).
[81] *Id.* § 1.
[82] U.S. Dep't of State, *supra* note 78, at 1094.

scope of U.S. involvement in Southeast Asia[83] and ultimately mandating withdrawal of U.S. forces from Vietnam.[84] The 1970 Department of Defense Appropriations Act prohibited the use of funds for "the introduction of American ground combat troops into Laos or Thailand."[85] Two years later, after President Nixon ordered U.S. ground troops into Cambodia, Congress prohibited the use of funds to "finance the introduction of United States ground combat troops into Cambodia."[86] In response to President Nixon's decision to bomb Cambodia from the air, which did not violate the prohibition on funding for "ground combat troops," Congress passed a bill to proscribe the use of funds for any combat activity in Cambodia and Laos.[87] Nixon vetoed the bill.[88] After the Paris Peace Treaty was concluded, Nixon signed a bill prohibiting the use of funds for combat operations in North Vietnam, South Vietnam, Laos, and Cambodia.[89]

4. War Powers Resolution

In response to perceived executive abuses of the use of armed force abroad, Congress passed the War Powers Resolution[90] on October 12, 1973.[91] President Nixon vetoed the bill,[92] but Congress overrode the veto and the Resolution became law on November 7, 1973.[93]

The stated purpose of the War Powers Resolution is to

> [e]nsure that the collective judgment of both the Congress and the President will apply to the introduction

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[83] *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 1065–67 (2008).
[84] *Id.* at 1067.
[85] *Id*. at 1065; U.S. Department of Defense Appropriations Act, 1970, Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969).
[86] Barron & Lederman, *supra* note 83, at 1065–66 (quoting Special Foreign Assistance Act of 1971, Pub. L. No. 91-952, § 7(a), 84 Stat. 1942, 1943 (1971)).
[87] *Id*.
[88] *Id.* at 1067.
[89] *Id.*
[90] 50 U.S.C. §§ 1541–1548 (2012).
[91] War Powers Resolution, H.R.J. Res. 542, 93d Cong. (1973); 119 CONG. REC. H8948-63 (daily ed. Oct. 12, 1973).
[92] Veto of the War Powers Resolution, 5 PUB. PAPERS 893 (Oct. 24, 1973).
[93] War Powers Resolution, H.R.J. Res. 542; 119 CONG. REC. H9661, S20116 (daily ed. Nov. 7, 1973).

> of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.[94]

To achieve that purpose, the Resolution requires the President to "consult with Congress" in "every possible instance" before committing U.S. forces to hostilities or situations in which they could be imminently involved in hostilities.[95] Once the President commits U.S. forces to such a situation, he must report to Congress within forty-eight hours "(A) the circumstances necessitating the introduction of United States Armed Forces; (B) the constitutional and legislative authority under which such introduction took place; and (C) the estimated scope and duration of the hostilities or involvement."[96] The Resolution further requires the President to withdraw U.S. forces within sixty days unless Congress declares war or enacts specific legislative authorization for the operation.[97]

Although Presidents have submitted more than 130 reports to Congress "consistent with" the War Powers Resolution,[98] every President since its enactment has considered it an unconstitutional infringement on the President's authority as commander in chief of the armed forces.[99] Courts have consistently invoked the political question doctrine or standing requirements to abstain from resolving this conflict between the executive and legislative branches.[100] As a result, one author has observed that "it is probably only a slight exaggeration to state that the most significant effect of the War Powers Resolution has been to provide separation of powers scholars with an interesting subject to analyze and debate."[101]

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[94] 50 U.S.C. § 1541 (2012).
[95] *Id.* § 1542.
[96] *Id.* § 1543.
[97] *Id.* § 1544.
[98] RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL33532, WAR POWERS RESOLUTION: PRESIDENTIAL COMPLIANCE 14 (2012).
[99] *Id*. at 2.
[100] *Id*. *See, e.g.*, Doe v. Bush, 323 F.3d 133, 144 (1st Cir. 2003); Crockett v. Reagan, 720 F.2d 1355, 1357 (D.C. Cir. 1983); Campbell v. Clinton, 52 F. Supp. 2d 34, 45 (D.D.C. 1999); Lowry v. Reagan, 676 F. Supp. 333, 341 (D.D.C. 1987); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 602 (D.D.C. 1983).
[101] Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. & MARY L. REV. 1149, 1152 (2001).

5. Recovery of the S.S. Mayaguez

As U.S. involvement in Vietnam was drawing to a close, the United States became involved in an unexpected conflict with the new Khmer Rouge government in Cambodia. On May 12, 1975, the Cambodian military seized a U.S. merchant ship, the S.S. *Mayaguez*, and detained its crew on a nearby island.[102] The Ford administration was concerned that, if the crew was taken to the mainland, the situation could devolve into a protracted and embarrassing negotiation for their release, or worse, result in harm to the crew.[103] President Ford ordered the U.S. military to use force to prevent the Cambodians from moving the crew to the mainland.[104] On May 13, U.S. military aircraft attacked Cambodian gunboats escorting a ship containing the crew.[105] The Cambodians took the crew to an island off the mainland, where they detained and interrogated the crew.[106]

On May 15, 1975, U.S. Marines landed on the island to rescue the crew and met stiff resistance.[107] U.S. Navy and Air Force aircraft also attacked targets on the island and on the mainland. [108] The U.S. government did not know it, but, as the attack began, the Cambodians were in the process of releasing the crew.[109]

As a matter of international law, the Ford administration justified the use of force to recover the Mayaguez and its crew as an act of self-defense. In a letter to the Secretary General of the UN seeking assistance in arriving at a diplomatic resolution, the U.S. Ambassador to the UN wrote:

> In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property,

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[102] Major Thomas E. Behuniak, *The Seizure and Recovery of the S.S.* Mayaguez*: A Legal Analysis of United States Claims, Part 1*, MIL. L. REV. 41, 46–49 (Fall 1978).
[103] *Id.* at 53–54.
[104] *Id.*
[105] *Id.* at 63.
[106] *Id.* at 66–67.
[107] *Id.* at 74–75.
[108] *Id.* at 79–81.
[109] *Id.* at 77–78.

> including appropriate measures of self-defense under Article 51 of the United Nations charter.[110]

After U.S. military operations had begun, the Ambassador notified the Security Council that "the United States Government has taken certain appropriate measures under Article 51 of the UN Charter whose purpose it is to achieve the release of the vessel and crew."[111]

As a matter of domestic law, when President Ford ordered the rescue the legislative restriction on using funds for combat activities in Cambodia was still in effect.[112] Nevertheless, while conceding that the rescue operation violated the letter of law, the Ford Administration argued that Congress could not have intended to prohibit the armed forces rescuing American citizens.[113]

The *Mayaguez* rescue operation was the fourth instance that implicated the War Powers Resolution, and the executive and legislative branches were still exploring the Resolution's contours.[114] President Ford notified congressional leaders immediately prior to the first use of force on May 13 and contended that that satisfied the consultation requirement of the War Powers Resolution even though he neither sought nor considered advice or opinions from Congress.[115]

6. Operation Urgent Fury

In October 1983, Marxist revolutionaries who sought to align themselves with Cuba and the Soviet bloc overthrew the government of the Caribbean Island nation of Grenada.[116] In addition to the issue of containment of communist expansion, a sizable population of U.S. citizens lived on the island.[117] The Iran hostage crisis was fresh in the

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[110] Behuniak, *supra* note 102, at 59, 119.
[111] *Id.* at 120–21.
[112] Barron & Lederman, *supra* note 83, at 1072–73.
[113] *Id.* at 1073.
[114] RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 10 (2012).
[115] *Id.*
[116] 2 UNITED STATES ARMY, *supra* note 56, at 399; COURTNEY GLASS, AMERICAN INTERVENTION IN GRENADA: THE IMPLICATIONS OF OPERATION "URGENT FURY" 10–11 (Peter M. Dunn & Bruce W. Watson eds., 1985).
[117] Major Ronald M. Riggs, *The Grenada Intervention: A Legal Analysis*, MIL. L. REV. 1, 34 (Summer 1985); UNITED STATES ARMY, OPERATION URGENT FURY: THE INVASION

minds of the nation and the Reagan Administration was concerned that, if U.S. citizens were not evacuated from Grenada, a new hostage crisis could be in the making.[118] Consistent with, if not in compliance with, the War Powers Resolution, President Reagan consulted with congressional leaders before ordering U.S. forces to execute *Operation Urgent Fury*.[119]

On October 25, 1983, U.S. armed forces invaded Grenada and, over four days, rescued U.S. citizens on the island and restored the previous government.[120] Later that day, President Reagan notified Congress of the invasion "consistent with the War Powers Resolution."[121]

The United States laid out its legal justification for the invasion in a letter from the State Department Legal Advisor to the American Bar Association's Section on International Law and Practice.[122] The letter identified three justifications for *Operation Urgent Fury*. First, the United States relied on an invitation by the legitimate government of Grenada.[123] The Governor General of Grenada, who was under house arrest at the time, managed to communicate a request to the United States and the Organization of Eastern Caribbean States for military intervention.[124] Second, *Operation Urgent Fury* was a regional enforcement action executed by the Organization of Eastern Caribbean States under Chapter VIII of the UN Charter.[125] Finally, the United States argued that protection of U.S. nationals abroad was a legitimate justification for the use of force.[126]

OF GRENADA, OCTOBER 1983, at 5 (2010), *available at* http://www.history.army.mil/html/books/grenada/urgent_fury.pdf.

[118] Robert J. Beck, *International Law and the Decision to Invade Grenada: A Ten Year Retrospective*, 33 VA. J. INT'L L. 765, 771 (1993) ("In October 1983, memories of the Iran hostage crisis were still fresh; no one in the administration needed to be reminded that Jimmy Carter's inability to effect the release of American hostages had greatly facilitated Ronald Reagan's electoral victory. Might Americans again be taken hostage? This frightful spectre was raised frequently during administration deliberations.").

[119] JOHN NORTON MOORE, LAW AND THE GRENADA MISSION 77 (1984).

[120] Riggs, *supra* note117, at 1.

[121] MOORE, *supra* note 119, at 77, 95–96.

[122] *Id.* at 125–29.

[123] *Id.* at 125–26.

[124] *Id.* at 126.

[125] *Id.* at 126–28.

[126] *Id.* at 128.

The letter did not take a position on whether any of the three bases on their own would have justified the use of force but stated that the United States determined that, taken together, they provided a "solid basis for the action."[127] The letter also specifically stated that the United States did not consider *Operation Urgent Fury* to be self-defense under Article 51 of the UN Charter.[128]

The United States never approached the UN Security Council seeking authorization for the use of armed force in Grenada.[129] Nevertheless, after the invasion, Nicaragua introduced a resolution to the Security Council condemning the U.S. action.[130] Eleven of the fifteen member states voted for the resolution; three abstained; and the United States cast the sole vote against the resolution.[131] Nevertheless, under the UN charter, the sole negative vote of a permanent member of the Security Council was sufficient to negate all of the votes in favor of a resolution.[132]

B. Post-Cold War

With the collapse of the Soviet Union in 1991, U.S. foreign policy and use of force decisions developed a new focus. Containment of communism was no longer an issue. The 1991 National Security Strategy Report signaled a military focus on regional conflicts rather than an effort to block Soviet expansionism.[133]

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[127] *Id.* at 126.
[128] *Id.* at 128.
[129] Riggs, *supra* note 117, at 14–15.
[130] U.N. S.C. Rep. of the Security Council, June 16 1983–June 15 1984, 26–27, U.N. Doc. A/39/2; GAOR, 39th Sess., Supp. No. 2 (1985).
[131] *Id.* at 27.
[132] *Id.*; U.N. Charter art. 27.
[133] THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 25 (1991) ("In a world less driven by an immediate, massive threat to Europe or the danger of global war, the need to support a smaller but still crucial forward presence and to deal with regional contingencies—including possibly a limited, conventional threat to Europe—will shape how we organize, equip, train, deploy and employ our active and reserve forces."); DON M. SNIDER, THE NATIONAL SECURITY STRATEGY: DOCUMENTING STRATEGIC VISION 9 (2d ed. 1995), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/pub332.pdf.

1. Operation Just Cause

By 1988 the long-running mutually beneficial relationship between Panamanian leader Manuel Noriega and successive U.S. administrations had come to an end.[134] Noriega had become involved in various criminal activities including drug trafficking. In May of 1989, Panama held elections and Noriega's preferred candidate lost.[135] Noriega nullified the election and had opposition candidates brutally beaten.[136] Through 1988 and 1989 Panamanian antagonism and intimidation of U.S. servicemembers and civilians and attacks on U.S. military installations in the Canal Zone had become rampant.[137] On December 15, 1989, the Panamanian legislature declared that a state of war existed between Panama and the United States.[138] The next day Panama Defense Forces shot and killed an off-duty U.S. Marine Officer and detained a Navy Officer and his wife, beating him and threatening her with sexual assault.[139]

On December 20, 1989, the United States commenced *Operation Just Cause*, an invasion of Panama by 24,500 U.S. military personnel, which quickly defeated the Panama Defense Forces, secured U.S. citizens, and sent Noriega into hiding at the Vatican Embassy in Panama City.[140] Noriega surrendered two weeks later, and he was sent to the United States where he was convicted of several drug offenses.[141]

The United States offered three justifications for *Operation Just Cause* in international law. First, the Bush Administration argued that the invasion of Panama was an act of self-defense under Article 51 of the UN Charter.[142] The Panamanian declaration of war, the attacks on U.S. military installations and the abuse of U.S. servicemembers and other citizens led to the conclusion that an armed attack had already occurred

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[134] 2 UNITED STATES ARMY, *supra* note 56, at 401; Jeffrey C. Tuomala, *Just Cause: The Thread That Runs So True*, 13 DICK J. INT'L L. 1, 5–6 (1994).
[135] Tuomala, *supra* note 134, at 7.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 8.
[139] *Id.*; 2 UNITED STATES ARMY, *supra* note 56, at 401.
[140] Tuomala, *supra* note 134 at 8; 2 UNITED STATES ARMY, *supra* note 56, at 402–06.
[141] Tuomala, *supra* note 134 at 8; 2 UNITED STATES ARMY, *supra* note 56, at 406.
[142] Letter from President George H. W. Bush to House Speaker Thomas Foley, *in* H.R. DOC. NO. 127 (1989).

or was imminent.[143] Second, the United States contended that the Panama Canal Treaties obligated the United States to ensure the Canal's continued operation and Noriega's actions threatened the operation of the Canal.[144] Third, the United States justified the invasion on the lawful request of the legitimate government of Panama.[145] Guillermo Endara, the candidate whose election Noriega nullified, welcomed and approved of the U.S. intervention.[146]

President Bush informed congressional leaders of the operation shortly before it began and, on December 21, 1989, he notified the whole Congress of the invasion "consistent with the War Powers Resolution."[147] On February 7, 1990, the Senate and the House of Representatives adopted a concurrent resolution retroactively approving of *Operation Just Cause*.[148]

The United States never sought a UN Security Council resolution authorizing *Operation Just Cause*. In fact, on December 23, 1989, the Security Council voted on a draft resolution "[s]trongly deplor[ing] the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States."[149] The draft resolution received ten votes in its favor, four votes in opposition, and one abstention.[150] Despite receiving a majority of votes of the members of the Security Council, the draft resolution was defeated because three of the four votes against were by permanent members of the Security Council.[151]

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[143] Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 284–86 (1991).
[144] *Id.* at 287–88.
[145] *Id.* at 288–90.
[146] *Id.*
[147] Tuomala, *supra* note 134, at 8.
[148] H.R. Con. Res. 262, 101st Cong. (1990).
[149] U.N. S.C. Rep. of the Security Council, June 16, 1989–June 15, 1990, U.N. Doc. A/45/2; GAOR, 45th Sess., Supp. No. 2 (1993).
[150] *Id.*
[151] *Id.* The four votes against were cast by Canada, France, the United Kingdom, and the United States. *Id.*

2. Operation Desert Storm

On August 2, 1990, three divisions of Iraq's elite Republican Guard invaded the neighboring nation of Kuwait and quickly defeated the Kuwaiti armed forces.[152] Iraq declared that oil-rich Kuwait was annexed to Iraq as its nineteenth province.[153] The United States, as well as Saudi Arabia and other nations, became concerned that Saudi Arabia could be next.[154] Recognizing the threat to world oil supplies, the United States sought, and was granted, Saudi permission to deploy U.S. troops in Saudi Arabia.[155] On August 8, the first units of the 82nd Airborne Division arrived in the Saudi desert, the first step in a massive military buildup to challenge Iraq's aggression. The force assembled in the Saudi desert eventually comprised nearly 700,000 troops from twenty-eight nations.[156]

The UN Security Council adopted a series of resolutions condemning Iraq's invasion of Kuwait and demanding an immediate withdrawal of Iraqi troops.[157] The first, Resolution 660, declared that Iraq's invasion of Kuwait constituted a "breach of international peace and security," condemned the invasion, and demanded that Iraq withdraw all its forces from Kuwait.[158] On November 29, 1990, the Security Council adopted Resolution 678, which gave Iraq a deadline of January 15, 1991, to comply with the earlier resolutions and authorized member states to use force to enforce compliance if Iraq refused.[159]

Iraq refused to comply with the Security Council's resolutions, and *Operation Desert Storm* began on January 16, 1991, with a multiphase

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[152] 2 UNITED STATES ARMY, *supra* note 56, at 416.
[153] *Id.*
[154] *Id*. at 416–18.
[155] *Id*. at 416–17.
[156] UNITED STATES ARMY, THE WHIRLWIND WAR 130 (Frank N. Schubert & Theresa L. Kraus, eds. 1995).
[157] S.C. Res. 660, U.N. Doc. S/RES/660 (Aug. 2, 1990); S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990); S.C. Res. 662, U.N. Doc. S/RES/662 (Aug. 9, 1990); S.C. Res. 664, U.N. Doc. S/RES/664 (Aug. 18, 1990); S.C. Res. 665, U.N. Doc. S/RES/665 (Aug. 25, 1990); S.C. Res. 666, U.N. Doc. S/RES/666 (Sept. 13, 1990); S.C. Res. 667, U.N. Doc. S/RES/667 (Sept. 16, 1990); S.C. Res. 670, U.N. Doc. S/RES/670 (Sept. 25, 1990); S.C. Res. 674, U.N. Doc. S/RES/674 (Oct. 29, 1990); S.C. Res. 677, U.N. Doc. S/RES/677 (Nov. 28, 1990); S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).
[158] S.C. Res. 660, *supra* note 157.
[159] S.C. Res. 678, *supra* note 157.

air campaign to prepare the battlefield for a ground assault.[160] On February 23, 1991, the ground attack began and, four days later, Iraqi forces were expelled from Kuwait.[161]

The U.S. decision to use force in *Operation Desert Storm* was supported in international law by a series of UN Security Council Resolutions, particularly Resolution 678, which specifically authorized the use of force by member states to expel Iraq from Kuwait.[162] The large coalition assembled by the Bush Administration also added significant international legitimacy to the effort, especially as many of Iraq's Arab neighbors were members of the coalition.[163]

As a matter of domestic law, President Bush maintained that he had constitutional authority unilaterally to order the deployment of U.S. armed forces to participate in *Operation Desert Storm* without congressional authorization.[164] Nevertheless, he asked Congress for a resolution supporting his decision.[165] On January 14, 1991, two days before the start of the air campaign, Congress passed the Authorization for Use of Military Force Against Iraq Resolution, which authorized the President "to use United States Armed Forces pursuant to UN Security Council Resolution 678."[166]

3. Somalia

In 1992, Somalia was experiencing a grave humanitarian crisis. In 1991, rebels overthrew President Mohammed Siad Barre, the dictator who had ruled Somalia for more than two decades.[167] The rebels soon

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[160] 2 UNITED STATES ARMY, *supra* note 56, at 419–20; John Quigley, *The United States and the United Nations in the Persian Gulf War: New Order or Disorder?*, 25 CORNELL INT'L L.J. 1, 9 (1992).
[161] 2 UNITED STATES ARMY, *supra* note 56, at 424–27.
[162] S.C. Res. 678, *supra* note 157.
[163] U.S. DEP'T OF DEF., CONDUCT OF THE PERSIAN GULF WAR 487–89, 521 (1992).
[164] JENNIFER K. ELSEA & RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 12–13 (2011).
[165] *Id.*
[166] Authorization of the Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).
[167] WALTER S. POOLE, OFFICE OF THE CHAIRMAN OF THE JOINT CHIEFS OF STAFF, THE EFFORT TO SAVE SOMALIA, AUGUST 1992–MARCH 1994, at 5–6 (2005), http://www.dtic.mil/doctrine/doctrine/history/somalia.pdf.

turned on each other, and the ensuing violence and drought resulted in widespread famine.[168]

The UN began working to distribute food and other humanitarian relief to Somalia,[169] and the U.S. Government and U.S. citizens working for relief organizations were heavily involved in this effort.[170] Unfortunately, the warring Somali clans looted and hoarded the supplies meant for the Somali population.[171] In response, the UN Security Council adopted Resolution 794, authorizing member states to "use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia."[172] The United States responded by deploying 13,000 troops to Somalia to secure the distribution of relief supplies in *Operation Restore Hope*.[173]

As a matter of international law, the U.S. justified its operations in Somalia on Security Council Resolution 794.[174] An Office of Legal Counsel (OLC) Opinion set forth the domestic legal justification for *Operation Restore Hope*, listing four bases for the introduction of U.S. combat forces into Somalia.[175]

First, the OLC opined that the President's constitutional authority as Chief Executive and Commander in Chief permitted him to order U.S. armed forces to conduct operations to further national interests such as protecting the lives of Americans in other nations.[176] In Somalia, U.S. troops would be protecting U.S. citizens and servicemembers assisting in the delivery and distribution of food aid.[177]

Second, the opinion noted that UN Security Council Resolution 794 authorized member states to "use all available means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia," and "[called] on Member States which are in a position to do so to provide military forces."[178] Resolution 794 provided clear authority

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[168] *Id.* at 6.
[169] *Id.* at 6–7.
[170] Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 6 (1992).
[171] 2 UNITED STATES ARMY, *supra* note 56, at 433.
[172] S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).
[173] 2 UNITED STATES ARMY, *supra* note 56, at 433–34.
[174] S.C. Res. 794, *supra* note 172.
[175] Memorandum Opinion for the Attorney General, 16 Op. O.L.C. 8 (1992).
[176] *Id.* at 9–10.
[177] *Id.* at 10.
[178] *Id*. at 11–12; S.C. Res. 794, *supra* note 172.

in international law for the United States to use armed force in Somalia, but Resolution 794 also justified the Bush Administration's actions as a matter of domestic policy as well.[179]

Third, the OLC opined that "maintaining the credibility of United Nations Security Council decisions, protecting the security of United Nations and related relief efforts, and ensuring the effectiveness of United Nations peacekeeping operations can be considered a vital national interest," justifying the use of armed force in Somalia.[180] Consequently, while Somalia itself may not have been a vital U.S. interest,[181] the reputation of the UN and the Security Council was.[182]

Finally, the OLC determined that recent legislation had evinced congressional approval of the President's decision.[183] In April 1992, Congress passed the Horn of Africa Recovery and Food Security Act, which set forth U.S. policy toward distribution of relief and rehabilitation assistance and international relief efforts in the Horn of Africa.[184] Section 3(b)(3) of the Act declared that "[i]t is the sense of Congress that the President should . . . ensure, to the maximum extent possible and in conjunction with other donors, that emergency humanitarian assistance is being made available to those in need."[185] Section 4 of the Act declared that "it should be the policy of the United States . . . to assure noncombatants (particularly refugees and displaced persons) equal and ready access to all food, emergency, and relief assistance"[186] and that "[i]t should be the policy of the United States in seeking to maximize relief efforts for the Horn of Africa to redouble its commendable efforts to secure safe corridors of passage for emergency food and relief supplies in affected areas."[187] From these sections of the Act, the OLC opined that "Congress appears to have contemplated that the President

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[179] Memorandum Opinion for the Attorney General, *supra* note 175, at 11–12.
[180] *Id.* at 11.
[181] POOLE, *supra* note 167, at 8 (quoting a message from the United States Ambassador to Kenya, "Tragic as the situation is in Somalia . . . the dissolution of the Somali nation-state does not affect vital [United States Government] security interests").
[182] Memorandum Opinion for the Attorney General, *supra* note 175, at 11–12.
[183] *Id.* at 13.
[184] Horn of Africa Recovery and Food Security Act, Pub. L. No. 102-274, 106 Stat. 115 (1992).
[185] *Id.*
[186] *Id.*
[187] *Id.*

might find it necessary to make use of military forces to ensure the safe delivery of humanitarian relief in Somalia."[188]

Operation Restore Hope took a sudden turn for the worse on June 5, 1993, when Somali warlord Mohammed Farrah Aidid's forces killed twenty-three Pakistani soldiers participating in the UN relief efforts.[189] The UN Security Council adopted Resolution 837 in response to Aidid's actions and "[urged] Member States to contribute, on an emergency basis, military support and transportation, including armoured personnel carriers, tanks and attack helicopters, to provide [UN forces] the capability appropriately to confront and deter armed attacks directed against it in the accomplishment of its mandate."[190]

The United States dispatched a Joint Special Operations Task Force to Somalia with the mission to find and arrest Mohammed Farrah Aidid.[191] This expanded mission relied on the same legal justifications as *Restore Hope*: the Security Council resolution and the Horn of Africa Recovery and Food Security Act.

4. Haiti

In 1991, a military coup led by Lieutenant General Raul Cedras ousted Haitian President Jean-Bertrand Aristide, the first democratically elected President in Haiti's history.[192] The UN and the Organization of American States responded with trade and economic sanctions against the illegitimate regime.[193] In 1993, Cedras appeared to concede to the sanctions regime and agreed to retire, to permit Aristide to return, and to

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[188] Memorandum Opinion for the Attorney General, *supra* note 175, at 13.
[189] 2 UNITED STATES ARMY, *supra* note 56, at 434–35.
[190] S.C. Res. 837, U.N. Doc. S/RES/837 (June 6, 1993).
[191] 2 UNITED STATES ARMY, *supra* note 56, at 435. United States forces never captured Mohammed Farrah Aidid. On October 3, 1992, during a raid to capture Aidid lieutenants, Somali militants shot down two U.S. Army Blackhawk helicopters. A fierce firefight ensued as U.S. forces tried to secure the two crash sites and evacuate dead and wounded crewmembers. *Id*. Eighteen U.S. servicemembers died and 84 were wounded. UNITED STATES ARMY, UNITED STATES FORCES, SOMALIA AFTER ACTION REPORT 139 (2003), http://www.history.army.mil/html/documents/somalia/SomaliaAAR.pdf. After televised reports aired of Somalis dragging the bodies of U.S. Soldiers through the streets of Mogadishu, public and political support for military operations dissipated. All U.S. forces left Somalia by March, 1994. 2 UNITED STATES ARMY, *supra* note 56, at 435–37.
[192] *Id.* at 437.
[193] *Id.*

ensure the retraining of Haitian security forces.[194] Cedras' cooperation was short-lived; his forces fired on a U.S. ship attempting to deliver UN troops, attacked the U.S. Chargé d'Affaires, and assassinated Aristide supporters.[195]

In 1994, the UN Security Council adopted Resolution 940, authorizing the establishment of a multinational force to facilitate "the departure from Haiti of the military leadership . . ., the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti."[196] President Clinton ordered the U.S. armed forces, as part of a multi-national coalition, to implement Resolution 940.[197]

President Clinton relied on Resolution 940 and implicit congressional authorization as legal bases for his order. The Department of Defense Appropriations Act of 1994 contained language limiting the use of funds "for United States military operations in Haiti" unless Congress specifically authorized such action or the President makes certain findings and reports on them to the Congress prior to any military operation.[198] President Clinton made the appropriate findings and reported them to Congress on September 18, 1994, the day before the operation was scheduled to begin.[199] President Clinton further determined that stopping Cedras' repression of the Haitian people and ensuring that Cedras kept his promises to the United States and United Nations was an important national security interest, further justifying the use of force.[200]

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[194] *Id.* at 438.
[195] *Id.*
[196] S.C. Res. 940, U.N. Doc. S/RES/940 (July 31, 1994).
[197] 2 UNITED STATES ARMY, *supra* note 56, at 438; President William J. Clinton, Television Address to the Nation on Haiti Agreement (Sept. 18, 1994) ("Under the terms of United Nations Security Resolution 940, an international coalition from twenty-five nations will soon go into Haiti to begin the task of restoring democratic government.").
[198] U.S. Department of Defense Appropriations Act, 1994, Pub. L. No. 103-139, § 8147, 107 Stat. 1418, 1474 (1993); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173–75 (1994).
[199] Deployment of United States Armed Forces into Haiti, *supra* note 198, at 173–75.
[200] President William J. Clinton, Address to the Nation on Haiti (Sept. 15, 1994) ("Beyond the human rights violations, the immigration problems, the importance of democracy, the United States also has strong interests in not letting dictators, especially in our own region, break their word to the United States and the United Nations.").

As U.S. forces were en route to Haiti to remove Cedras from power, a last minute diplomatic effort succeeded in convincing Cedras to step down. U.S. envoys told Cedras that a military operation was imminent, and this information helped to persuade him that his position was untenable.[201]

5. Bosnia

The nation of Yugoslavia began to break apart in 1991. In 1992, when Bosnia and Herzegovina attempted to secure its independence, its ethnically Serbian population revolted, beginning a "gruesome campaign of murder, rape, and intimidation labeled 'ethnic cleansing' [that] forced dispossessed refugees from areas the Serbs wanted to control."[202] UN member states dispatched peacekeeping troops to monitor agreed-upon cease-fires. Serbian troops regularly defied the peacekeepers, including an attack on a so-called UN safe area in Srebrenica which resulted in a massacre of Bosnian Muslims,[203] the seizure of UN peacekeepers to use as shields against United States and NATO airstrikes,[204] and the shelling of a Sarajevo marketplace.[205] Finally, in 1995, the various factions met and negotiated a peace agreement that would be overseen by an Implementation Force, or IFOR, consisting of troops from the United States, other NATO nations, and Russia.[206]

The justification in international law for the U.S. action in Bosnia was straightforward. The UN Security Council adopted several resolutions authorizing member states to use force in support of UN operations in Bosnia[207] and one specifically to participate in IFOR.[208]

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[201] 2 UNITED STATES ARMY, *supra* note 56, at 438–39.
[202] *Id.* at 444.
[203] *Id.*
[204] *Id.* at 445.
[205] *Id.*
[206] *Id.* at 445–46.
[207] S.C. Res. 816, U.N. Doc. S/RES/816 (Mar. 31, 1993) (authorizing the use of force to enforce a no-fly zone); S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993) (authorizing the use of force to protect U.N.-designated safe areas); S.C. Res. 844, U.N. Doc. S/RES/844 (June 18, 1993) (authorizing the use of force to protect U.N.-designated safe areas).
[208] S.C. Res. 1031, U.N. Doc. S/RES/1031 (Dec. 15, 1995).

NATO also endorsed the operation, giving it additional international legitimacy.[209]

The U.S. Department of Justice's Office of Legal Counsel opined that the President had authority unilaterally to order U.S. military forces to participate as part of IFOR.[210] The OLC opinion begins by noting that, although Congress has authority to declare war, Presidents have inherent authority to order U.S. military forces into action in circumstances short of war when vital national interests are at stake.[211] The opinion notes that, due largely to the fact that U.S. forces had been invited to participate by the former warring parties, there was a reduced likelihood of combat and casualties, leading the administration to conclude that the proposed operation would not constitute a war in the constitutional sense.[212]

Next, the opinion describes three "significant national security interests" served by U.S. participation in IFOR. First, the United States has a fundamental interest in the security and stability of Europe. If the war in the former Yugoslavia were to continue, it could spread to other European nations, particularly new democracies in Eastern Europe.[213] Second, the United States has a vital national interest in maintaining the credibility of the UN Security Council and ensuring the effectiveness of UN peacekeeping operations.[214] Third, the United States has a similar interest in the stability of the NATO alliance, which is "the anchor of America's and Europe's common security."[215]

Finally, the opinion addresses the War Powers Resolution and determines that it does not prohibit the President from initially ordering the unilateral deployment of troops.[216] The opinion argues that Congress recognized the President's authority unilaterally to order the use of armed force without prior congressional authorization because the Resolution requires the President to report to Congress within forty-eight hours of introducing U.S. armed forces into hostilities or situations where

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[209] Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 327 (1995).
[210] *Id.*
[211] *Id.* at 329–30.
[212] *Id.* at 330.
[213] *Id.* at 331.
[214] *Id.*
[215] *Id.*
[216] *Id.* at 332–33.

hostilities are imminent,.[217] The opinion notes the Resolution's sixty and ninety day timelines, but does not address them, presumably because the OLC was concerned only with the President's authority to begin the operation.[218]

6. Kosovo

The next region of the former Yugoslavia to boil over was Kosovo, a region of Serbia that was populated mostly by ethnic Albanians.[219] When Kosovo tried to exert its independence and gain a measure of autonomy from Serbian rule, the result was ruthless suppression aimed at cleansing the region of ethnic Albanians.[220]

The United States joined a NATO air campaign to punish Serbian aggression against the Kosovar Albanians.[221] Neither the United States nor its NATO allies sought a Security Council resolution authorizing the air campaign, expecting that Russia, and possibly China, would veto such a resolution.[222] After seventy-eight days of bombings, Serbia relented and agreed to remove its forces from Kosovo and permit peacekeepers into the region to oversee the cease fire.[223] The UN Security Council adopted Resolution 1244, "[authorizing] Member States and relevant international organizations to establish the international security presence in Kosovo . . . with all necessary means to fulfill its responsibilities."[224]

Congress never specifically authorized the U.S. involvement in the NATO air campaign.[225] Although U.S. Presidents had, many times

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[217] *Id.* at 333.
[218] *Id.*
[219] 2 UNITED STATES ARMY, *supra* note 56, at 450.
[220] *Id.*
[221] *Id.* (noting that NATO had decided to avoid ground operations and that this decision was based more on political concerns than military realities).
[222] Hakimi, *supra* note 9, at 672–73; Anthea Roberts, *Legality vs. Legitimacy: Can Uses of Force be Illegal but Justified?*, *in* HUMAN RIGHTS, INTERVENTION, AND THE USE OF FORCE 179, 181–82 (P. Alston & E. Macdonald, eds., 2008), *available at* http://ssrn.com/abstract=1518290.
[223] 2 UNITED STATES ARMY, *supra* note 56, at 452.
[224] S.C. Res. 1244, ¶ 7, U.N. Doc. S/RES/1244 (June 10, 1999).
[225] Gerald G. Howard, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 HOUS. L. REV. 261, 285–88 (2001). The U.S. Senate did adopt a nonbinding resolution suggesting that the President was authorized to conduct "military operations and missile

previously, ordered U.S. armed forces into hostilities without congressional approval, Kosovo was the first instance since the passage of the War Powers Resolution in which hostilities exceeded the Resolution's sixty-day limit without congressional authorization.[226] Under the War Powers Resolution, the President was required to withdraw U.S. forces unless Congress authorized the action.[227] Twenty-six members of Congress filed a lawsuit alleging that President Clinton had violated the War Powers Resolution and seeking a declaratory judgment to that effect.[228] The court ruled that the plaintiffs lacked standing, as individual members of Congress, to bring the lawsuit and, therefore, dismissed the complaint.[229]

C. Post-9/11

The terrorist attacks of September 11th, 2001, resulted in a fundamental change in the nature of the threat facing the United States and, at least temporarily, in the United States' view of *jus ad bellum*. The 2002 National Security Strategy Report stated that "[t]he gravest danger our Nation faces lies at the crossroads of radicalism and technology. Our enemies have openly declared that they are seeking weapons of mass destruction, and evidence indicates that they are doing so with determination."[230]

In addition to identifying the principal threat facing the United States, the 2002 Report announced the "Bush Doctrine" of preemptive self-defense:

> We must adapt the concept of imminent threat to the capabilities and objectives of today's adversaries. . . . The United States has long maintained the option of preemptive actions to counter a sufficient threat to our national security. The greater the threat, the greater is the

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strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia (Serbia and Montenegro)," but, without House concurrence, this carried no congressional authority. S. Con. Res. 21, 106th Cong., 145 CONG. REC. S3110, S3118 (1999).

[226] GRIMMETT, *supra* note 114, at 35.

[227] 50 U.S.C. § 1544 (2012).

[228] Campbell v. Clinton, 52 F. Supp. 2d 34, 35 (D.D.C. 1999).

[229] *Id.* at 45.

[230] THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES, at iv (2002).

> risk of inaction—and the more compelling the case for taking anticipatory action to defend ourselves, even if uncertainty remains as to the time and place of the enemy's attack. To forestall or prevent such hostile acts by our adversaries, the United States will, if necessary, act preemptively.[231]

This extension of the traditional concept of imminence was controversial, but President Bush determined that, if the United States had to wait until a terrorist attack using weapons of mass destruction was imminent in the traditional sense, it would be too late to act.[232]

1. Operation Enduring Freedom

The United States quickly identified the al-Qaeda terrorist organization as the perpetrator of the September 11, 2001 attacks and set out to respond.[233] Al Qaeda operated from Afghanistan under the protection of the Taliban and, on October 7, 2001, *Operation Enduring Freedom* began with air and missile strikes.[234] Twelve days later U.S. Special Operations Forces began operating on the ground, providing support to Afghans who had been fighting the Taliban.[235] U.S. and Afghan forces quickly removed the Taliban from power but the Taliban and al Qaeda began an insurgent campaign against the new Afghan government.[236]

The international law justification for *Operation Enduring Freedom* was self-defense under Article 51 of the UN Charter.[237] The United States claimed that the September 11, 2001, attacks constituted an armed

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[231] *Id.* at 15.
[232] *Id.*
[233] 2 UNITED STATES ARMY, *supra* note 56, at 468.
[234] *Id.* at 469.
[235] *Id.*
[236] *Id.* at 473.
[237] Permanent Rep. of the United States of America to the U.N., Letter dated Oct. 7, 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) ("In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective self-defence following armed attacks that were carried out against the United States on 11 September, 2001.").

attack justifying the use of force in self-defense.[238] The United States' actions also enjoyed broad international support, and, although the initial phases of military operations in Afghanistan were conducted solely by U.S. forces, they were soon joined by a coalition of forces from eighteen nations to support the new Afghan government in its fight against the Taliban and al Qaeda.[239]

As a matter of domestic law, the U.S. Department of Justice's Office of Legal Counsel opined that the President had authority to act without congressional approval in response to the September 11, 2001, attacks and against "foreign States suspected of harboring or supporting" the terrorists who carried out the attacks.[240] Ultimately, the question of unilateral action was moot as Congress quickly passed a joint resolution authorizing the President

> to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[241]

The resolution also stated that it constituted specific statutory authority to introduce U.S. armed forces into hostilities pursuant to the War Powers Resolution.[242]

The international and domestic legal justification for the U.S. response to the September 11, 2001, terrorist attacks was fairly straightforward. When the United States sought to expand its response beyond the Taliban and al Qaeda in Afghanistan, however, the legal issues became more complicated and controversial.

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[238] *Id.*
[239] 2 UNITED STATES ARMY, *supra* note 56, at 474.
[240] Memorandum Op. for the Deputy Counsel to the President, The President's Constitutional Auth. to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sep. 25, 2001), http://www.justice.gov/olc/warpowers 925.htm.
[241] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[242] *Id.*

2. Operation Iraqi Freedom

Iraq had been a thorn in the side of the international community since soon after the end of the 1991 Persian Gulf conflict.[243] Iraq accepted certain conditions in exchange for a coalition cease-fire, including "destruction, removal, or rendering harmless" of all chemical and biological weapons.[244] In the decade after the cease-fire, Iraq consistently evaded and ignored its agreed-upon responsibilities,[245] and, by 2002, the U.S. intelligence community believed that Iraq was reconstituting its weapons of mass destruction program.[246]

The initial U.S. response was diplomatic, working through the UN and the International Atomic Energy Agency to convince Iraq to abandon its weapons of mass destruction development programs.[247] Iraq refused to comply with inspection requirements, leading the United States to consider military options.[248] The United States expended considerable effort to secure a new Security Council resolution specifically authorizing the use of force, but, when it became clear that the proposed resolution would fail, the United States abandoned the effort.[249]

Operation Iraqi Freedom began on March 20, 2003, with a missile strike on a bunker believed to contain Iraqi leader Saddam Hussein, his two sons, and other regime leaders.[250] The initial strike was immediately followed by an air and ground assault by U.S. and coalition forces.[251] By April 9, 2003, U.S. troops were in Baghdad and organized resistance was crumbling.[252] Fighting would continue for nearly seven years as

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[243] Memorandum Op. for the Counsel to the President, Auth. of the President Under Domestic and Int'l Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 145–50 (2002), http://www.justice.gov/olc/opiniondocs/milit-force-iraq.pdf; 2 UNITED STATES ARMY, *supra* note 56, at 480.

[244] U.N. S.C. Res. 687 ¶ 8, U.N. Doc. S/RES/687 (Apr. 3, 1991).

[245] Memorandum Opinion, *supra* note 243, at 147–50; 2 UNITED STATES ARMY, *supra* note 56, at 480.

[246] Memorandum Opinion, *supra* note 243, at 195–96.

[247] John Yoo, *International Law and the War in Iraq*, 97 AM. J. INT'L L. 563, 566 (2003).

[248] *Id.*; 2 UNITED STATES ARMY, *supra* note 56, at 481.

[249] Geoffrey Corn & Dennis Gyllensporre, *International Legality, the Use of Military Force, and Burdens of Persuasion: Self-Defense, the Initiation of Hostilities, and the Impact of the Choice Between Two Evils on the Perception of International Legitimacy*, 30 PACE L. REV. 484, 508–14 (2010).

[250] 2 UNITED STATES ARMY, *supra* note 56, at 483.

[251] *Id.*

[252] *Id.* at 490.

Operation Iraqi Freedom transformed from a conventional war to a counterinsurgency.[253]

The international law justification for *Operation Iraqi Freedom* was based, in part, on UN Security Council Resolution 678, which was adopted in 1990 to authorize the 1991 Persian Gulf War.[254] Resolution 678 authorized member states "to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent relevant resolutions and to restore international peace and security in the area."[255] Two such "subsequent relevant resolutions" required Iraq to comply with the 1991 cease-fire terms, which included permanently dismantling its weapons of mass destruction program[256] and to cease repression of Iraq's civilian population.[257] The United States determined that Iraq was in material breach of both resolutions and concluded that Resolution 678's authorization to "use all necessary means" was still in effect even though the UN Security Council did not specifically authorize any new military intervention to enforce its previous resolutions.[258]

The United States also enjoyed broad international support for *Operation Iraqi Freedom* although there was significant international disagreement about the legality and probity of the operation.[259] Three other nations contributed troops to the initial invasion[260] and another thirty-four nations participated in later operations in Iraq.[261]

Even in the absence of specific UN authority or international approval, the United States considered *Operation Iraqi Freedom* to be legal as an act of anticipatory self-defense, permitted under Article 51 of the UN Charter.[262] The United States determined that Iraq's history of developing and using weapons of mass destruction along with its relationship with terrorist organizations made the threat imminent.[263] The Office of Legal Counsel observed

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[253] *Id.* at 490–508.
[254] Memorandum Opinion, *supra* note 243, at 163–66, 177.
[255] S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).
[256] S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 3, 1991).
[257] S.C. Res. 688, U.N. Doc. S/RES/688 (Apr. 5, 1991).
[258] Memorandum Opinion, *supra* note 243, at 177.
[259] Yoo, *supra* note 247, at 563.
[260] UNITED STATES ARMY, ALLIED PARTICIPATION IN OPERATION IRAQI FREEDOM 6 (Steven A. Carney 2011).
[261] *Id*. at 1.
[262] Memorandum Opinion, *supra* note 243, at 194–98.
[263] *Id.* at 195–97.

> that even if the probability that Iraq itself would attack the United States with [Weapons of Mass Destruction], or would transfer such weapons to terrorists for their use against the United States, were relatively low, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if we do not use force, the threat will increase, could lead the President to conclude that military action is necessary to defend the United States.[264]

As a matter of domestic law, on October 11, 2002, Congress adopted the Authorization for Use of Military Force Against Iraq Resolution of 2002, which authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."[265] The resolution also stated that it constituted specific statutory authority to introduce U.S. armed forces into hostilities pursuant to the War Powers Resolution.[266]

3. Operation Odyssey Dawn

In early 2011, the Libyan regime of Colonel Muammar Qadhafi faced an increasingly active opposition.[267] The regime responded with brutal suppression, including deliberate targeting of civilian protesters.[268] In March 2011, Qadhafi's forces were preparing to assault the city of Benghazi, an opposition stronghold, and Qadhafi pledged that they would show "no mercy and no pity."[269]

The UN Security Council authorized the use of force "to protect civilians and civilian populated areas under threat of attack in the Libyan

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[264] *Id.* at 197.
[265] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 (2002).
[266] *Id.*
[267] Memorandum Opinion for the Attorney General, Authority to Use Military Force in Libya 1 (Apr. 1, 2011), http://www.justice.gov/olc/2011/authority-military-use-in-libya.pdf.
[268] *Id.*
[269] *Id.*

Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory."[270] In other words, NATO forces, including U.S. armed forces, were authorized only to protect civilians using air and naval forces but could not introduce ground forces into Libya.

Operation Odyssey Dawn was the U.S. contribution to a NATO-led mission with forces from seventeen nations.[271] Although the U.S. armed forces were in the lead for the first phase of the operation, they quickly turned command and control over to NATO, increasing the international legitimacy of the operation.[272]

As a matter of international law, the United States justified its military operations in Libya on Security Council Resolution 1973.[273] The participation of coalition forces added additional legitimacy to the United States' involvement in the operation.[274]

Domestically, the Department of Justice's Office of Legal Counsel determined that the President had unilateral authority to order U.S. armed forces to participate in *Operation Odyssey Dawn* without prior congressional authorization.[275] They also opined that U.S. participation did not rise to the level of hostilities that would invoke the War Powers Resolution.[276] President Obama declared that preventing Qadhafi's forces from massacring civilians in Benghazi was in the United States' national interest, because such a massacre would create a refugee crisis in Egypt and Tunisia, countries that were in the midst of a "fragile" transition to democratic governance.[277]

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[270] U.N. S.C. Res. 1973, U.N. Doc. S/RES/1973 (Feb. 26, 2011).
[271] JEREMIAH GERTLER, CONG. RESEARCH SERV., R41725, OPERATION ODYSSEY DAWN (LIBYA): BACKGROUND AND ISSUES FOR CONGRESS 7, 13–14 (2011).
[272] *Id.* at 14–16.
[273] Memorandum Opinion, *supra* note 267, at 6.
[274] GERTLER, *supra* note 271, at 16–20.
[275] Memorandum Opinion, *supra* note 267, at 14.
[276] *Id.* at 8.
[277] President Barack Obama, Remarks by the President in Address to the Nation on Libya (Mar. 28, 2011), http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-address-nation-libya.

4. Syria

Small demonstrations against the Bashar al Assad regime in Syria began in early 2011.[278] By March of that year, these demonstrations developed into a popular uprising and the violence continued to escalate into 2012.[279] By August 2012, more than 20,000 Syrians had been killed, more than 155,000 sought refuge in neighboring countries, and up to one million were internally displaced.[280]

On August 20, 2012, President Obama declared that Assad's use of chemical weapons might prompt the United States to use military force in Syria.[281] Just over one year later, on August 21, 2013, the Assad regime reportedly used chemical weapons in an attack on a Damascus suburb. Faced with evidence that Syria had crossed its "red line," the U.S. government considered whether the use of force was warranted or justifiable.

Press reports indicated that the Obama administration would prefer to have the support of the UN Security Council,[282] but expected Russia to veto any resolution authorizing the use of force.[283] In a televised address on August 31, 2013, President Obama said that he was "comfortable going forward without the approval of a United Nations Security Council

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[278] JEREMY M. SHARP & CHRISTOPHER M. BLANCHARD, CONG. RESEARCH SERV. R33487, ARMED CONFLICT IN SYRIA: U.S. AND INTERNATIONAL RESPONSE 1–2 (2012).
[279] *Id*. at 2–3.
[280] *Id*. at 3.
[281] President Barack Obama, Remarks by the President to the White House Press Corps (Aug. 20, 1012), http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps ("We have been very clear to the Assad regime, . . . that a red line for us is we start seeing a whole bunch of chemical weapons moving around or being utilized. That would change my calculus. That would change my equation.").
[282] Adam Entous & Sam Dagher, *U.S. Talks Tough on Syria, Ramps Up Attack Planning*, WALL ST. J., Aug. 26, 2013, http://online.wsj.com/news/ articles/SB10001424127887323 407104579034633663263254 ("If he decides to act militarily, Mr. Obama would prefer to do so with U.N. Security Council backing, but officials said he could decide to work instead with international partners such as the North Atlantic Treaty Organization or the Arab League. 'We'll consult with the U.N. They're an important avenue. But they're not the only avenue,' a senior administration official said.").
[283] *Id*. ("In the past, U.N. Security Council resolutions seeking to punish Mr. Assad have been blocked by Russia, which was critical of the NATO-led mission in Libya in 2011. Administration lawyers have, however, developed legal approaches that Mr. Obama could opt to use to justify a military intervention without U.N. backing.").

that, so far, has been completely paralyzed and unwilling to hold Assad accountable."[284]

In his August 31, 2013, speech, President Obama justified military action against Syria based on U.S. national security interests, including support for "the global prohibition on the use of chemical weapons," protection of U.S. "friends and . . . partners along Syria's borders," and prevention of "escalating use of chemical weapons, or their proliferation to terrorist groups."[285] Based on the threat posed to U.S. national security interests, President Obama "decided that the United States should take military action against Syrian regime targets."[286] Having determined that the use of force was warranted, President Obama sought to legitimize U.S. military action by seeking congressional approval.[287]

President Obama asserted that he had the authority to order a military strike against Syria without congressional approval, but that congressional approval would make the nation stronger and make its actions more effective.[288] According to White House Counsel Kathryn Ruemmler, the purpose behind seeking congressional approval was to enhance the legitimacy of a potential strike.[289]

While Congress debated the issue, diplomatic efforts to resolve the crisis continued. In early September 2013, Russia agreed to pressure Syria to give up its chemical weapons and Syria agreed to give up its

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[284] President Barack Obama, Statement by the President on Syria (Aug. 31, 2013), http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria.

[285] *Id*.

[286] *Id*.

[287] *Id*. ("But having made my decision as Commander-in-Chief based on what I am convinced is our national security interests, I'm also mindful that I'm the President of the world's oldest constitutional democracy. . . . And that's why I've made a second decision: I will seek authorization for the use of force from the American people's representatives in Congress.").

[288] *Id*. ("[W]hile I believe I have the authority to carry out this military action without specific congressional authorization, I know that the country will be stronger if we take this course, and our actions will be even more effective.").

[289] Charlie Savage, *Obama Tests the Limits of Power in Syrian Conflict*, N.Y. TIMES, Sept. 8, 2013, http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria ("The president believed that it was important to enhance the legitimacy of any action that would be taken by the executive, to seek Congressional approval of that action and have it be seen, again as a matter of legitimacy both domestically and internationally, that there was a unified American response to the horrendous violation of the international norm against chemical weapons use.").

stockpile of chemical weapons.[290] President Obama credited the threat of using force for pushing the Syrian regime's concessions, and he asked Congress to postpone a vote to authorize the use of force while the parties pursued a diplomatic resolution.[291]

Even though the United States ultimately decided not to use force in the Syrian conflict, the public debate over the justification for the use of force, leading to President Obama's determination that the use of force was justified, demonstrated the importance of legitimacy in U.S. use of force decisions. The United States would have welcomed a UN Security Council resolution, but recognizing that obtaining one was unlikely, it declared that a resolution was unnecessary.[292] The President determined that Syria's use of chemical weapons jeopardized important U.S. national security interests, and that was sufficient for him to determine that the use of force was justified.[293] However, to increase the legitimacy of any military strike, he sought approval from Congress.[294]

IV. Framework for Use of Force Decisions

As the discussion in Part III above shows, the UN Charter's use of force framework does not present a practical legal barrier to the use of force by the United States. The United States professes fealty to the concepts of international and domestic law regulating the resort to force, but in practice the decision to use force in international relations is more a matter of legitimacy than law. Many factors must be considered in evaluating the legitimacy of a decision to use armed force in international relations. These decisions are extremely fact specific, making some legal and legitimacy factors more prevalent in some cases and not in others.

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[290] President Barack Obama, Remarks by the President in Address to the Nation on Syria (Sept. 10, 2013), http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria.
[291] *Id*.
[292] *See supra* text accompanying notes 282–84.
[293] *See supra* text accompanying notes 285–87.
[294] *See supra* text accompanying notes 288–89.

Rather than a bright line that, when crossed, signals that a use of force is justified, the decision is best viewed as a spectrum of legitimacy, similar to Justice Jackson's formulation of executive power in *Youngstown Sheet & Tube v. Sawyer*.[295] In 1952 the United States was engaged in the Korean War and several of its major steel producers were engaged in a labor dispute with their unions.[296] The unions were preparing to strike, which would halt steel output and threaten industries vital to the war effort.[297] To prevent this, President Truman issued an executive order directing the seizure of various steel plants and facilities, which then would be operated by the federal government.[298]

Several companies subject to the executive order, including Youngstown Sheet & Tube Company, sued, seeking declaratory and injunctive relief.[299] The Supreme Court held that the President did not have the authority, on his own, to seize private property.[300] In a concurring opinion, Justice Jackson describes the limits of the President's power vis-à-vis Congress as a spectrum. When the President acts with congressional authorization, his authority is at its maximum. When he acts contrary to the express or implied will of Congress, his authority is at its lowest ebb. In between these extremes is a "zone of twilight."[301]

Similarly, there is a spectrum of legitimacy with regard to use of force decisions. When a President has the backing of the UN Security Council, a strong multinational coalition, congressional support, and a clear national interest, the legitimacy of the decision to use force is at its maximum. Lacking all of these, the President may still have the authority to order the use of force, but the legitimacy of the decision would be at its lowest ebb. Often, the President is at neither extreme, but has some combination of legitimacy factors in his favor. These legitimacy factors include both international and domestic considerations.

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[295] 343 U.S. 579 (1952).
[296] *Id.* at 582.
[297] *Id.* at 582–83.
[298] *Id.* at 583.
[299] *Id.*
[300] *Id.* at 587–88.
[301] *Id.* at 635–38.

A. International Considerations

The United States of America was born with a "decent respect to the opinions of mankind,"[302] and it still seeks to act with international support for its actions even when it claims the authority to act unilaterally. Although successive administrations since 1945 have acted in ways that suggest international law is not binding on the decision to use armed force, they have almost universally sought to legitimize their actions as supported by international law.

1. United Nations Security Council Resolution

As discussed above, the UN is not a realistic impediment to the United States' use of force. For example, the United States used or threatened armed force without Security Council approval and without a claim of self-defense in the Cuban Missile Crisis, Grenada, Kosovo, and Syria. Nonetheless, the UN can add incomparable legitimacy to an operation when the Security Council authorizes the use of force.[303] For this reason, the United States has expended considerable effort to secure Security Council authorization for its military operations whenever possible even when it contends that no such authorization is required.[304]

Nevertheless, when the United States determines that it does not have time to secure a resolution, it has not felt constrained by the requirement. For example, when Cambodian forces seized the crew of the *S.S. Mayaguez*, the Ford administration was concerned that if the crew reached the Cambodian mainland, freeing them would become exceedingly more difficult.[305] As a result, although the United States did seek the UN General Secretary's assistance in reaching a diplomatic solution, it did not wait long before launching the rescue operation.[306]

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[302] THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

[303] Glennon, *supra* note 18, at 501; David C. Hendrickson & Robert W. Tucker, *The Sources of American Legitimacy*, FOREIGN AFF., Nov./Dec. 2004, at 18, 26 ("Neither George H.W. Bush nor Bill Clinton allowed the Security Council to constrain U.S. policy in all instances, but they were keenly aware of the importance of respecting the international body."); Kagan, *supra* note 10, at 82 ("[A] Security Council authorization is never essential. It is a means to the end of gaining allied support, but not an end in itself.").

[304] *See supra* text accompanying notes 249 (discussing the Bush Administration's efforts to secure a Security Council resolution authorizing military force against Iraq).

[305] Behuniak, *supra* note 102, at 53–54.

[306] *See supra* text accompanying notes 110–11.

The United States made no effort to secure a Security Council resolution, choosing instead to rely on a claim of self-defense.

Similarly, if it appears that the United States will be unsuccessful in obtaining a Security Council resolution, it may choose to not seek one. For example, in the Cuban Missile Crisis, *Operation Urgent Fury*, Kosovo, and Syria the United States' aims were contrary to the policy of another permanent member of the Security Council.[307] Trying and failing may have a greater negative effect on the legitimacy of an operation than not trying at all. On several occasions other nations have sought Security Council resolutions condemning U.S. actions, but none have been successful due to the United States' veto authority.[308]

2. International Cooperation

Whether or not the United States is able to convince the UN Security Council to adopt a resolution authorizing the use of force, the United States has developed a preference for coalition warfare.[309] In every instance examined in Part III except two, the *Mayaguez* recovery and *Operation Just Cause*, the United States acted with multinational partners. Arguably, the United States could have acted unilaterally in several cases, but chose to work with other nations.[310] In addition to

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[307] *See supra* text accompanying notes 71–73 (Cuban Missile Crisis), 129–32 (*Operation Urgent Fury*), 222 (Kosovo), 282–84 (Syria).

[308] U.N. S.C. Rep. of the Security Council, June 16 1983–June 15 1984, 26–27, U.N. Doc. A/39/2; GAOR, 39th Sess., Supp. No. 2 (1985); U.N. S.C. Rep. of the Security Council, June 16, 1989–June 15, 1990, U.N. Doc. A/45/2; GAOR, 45th Sess., Supp. No. 2 (1993).

[309] *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 41 (2010); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (2006); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 3, 11 (2010).

[310] Kagan, *supra* note 10, at 84–85.

> [I]t is an open question whether the United States can 'go it alone' in a material sense. Militarily, it can and does go it virtually alone, even when the Europeans are fully on board, as in Kosovo and in the Persian Gulf War. Economically, it can go it alone too if it must, as with the reconstruction of places such as Iraq. (Five decades ago, after all, it rebuilt Europe and Japan with its own funds.) It is more doubtful, however, whether the American people will continue to support both military actions and the burdens of postwar occupations in the face of constant charges of illegitimacy by the United States' closest democratic allies.

increasing the size and capabilities of a force, operating as part of a coalition adds international legitimacy to an operation.[311]

Coalition operations have their disadvantages as well. At the tactical level, units from different nations may have difficulty coordinating operations. For example, in Afghanistan, most troop-contributing nations have imposed "national caveats" on their forces, limiting the types of operations they can conduct.[312] More seriously for the initial decision to use force, however, is the complexity of synchronizing strategic and operational goals and rules of engagement.[313] Nevertheless, the United States has developed an intentional practice over the course of many administrations of engaging in coalition operations whenever practicable.[314]

3. United States Understanding of Customary International Law Relating to Jus ad Bellum

The wording of Article 51 of the UN Charter has generated much debate about the legitimate extent of self-defense authorized by the Charter. On the one hand, some argue that the text limits self-defense to instances of "armed attack," requiring a nation to absorb an actual attack by armed force before invoking the right of self-defense.[315] On the other hand, some point to the Charter's recognition of an inherent right of self-defense and argue that the Charter is merely declaring that states have the same right of self-defense under the charter as they had before it became effective.[316] The U.S. position is much closer to the latter point of view

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Id.

[311] James A. Helis, *Multilateralism and Unilateralism*, *in* 2 U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY ISSUES: NATIONAL SECURITY POLICY AND STRATEGY 169, 171 (J. Boone Bartholomees, Jr., ed., 5th ed. 2012) ("[M]easuring allies' worth only in terms of their military capabilities ignores the importance of their political and diplomatic contributions."); Wayne A. Silkett, *Alliance and Coalition Warfare*, PARAMETERS, Summer 1993, at 74, 75 (noting that "few factors contribute to public legitimacy like a coalition effort.").

[312] HELLE C. DALE, THE HERITAGE FOUND., NATO IN AFGHANISTAN: A TEST CASE FOR FUTURE MISSIONS 4–5 (2006), http://www.heritage.org/research/reports/2006/12/nato-in-afghanistan-a-test-case-for-future-missions.

[313] Silkett, *supra* note 311, at 79–80.

[314] *See* THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 41 (2010); THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES 48 (2006); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 3, 11 (2010).

[315] *See* BROWNLIE, *supra* note 36, at 275–78.

[316] *See* Yoo, *supra* note 247, at 739–40.

and includes an extensively broad understanding of the right of self-defense.[317]

The United States has also justified the use of force by its obligation to protect its citizens abroad.[318] The UN Charter does not sanction the use of force for protection of nationals abroad unless it meets the requirements of self-defense under Article 51 and many scholars contend that, by itself, it does not.[319] The U.S. position has been inconsistent on this matter, invoking Article 51 to protect U.S. citizens in the *Mayaguez* rescue,[320] but rejecting it as a justification for *Operation Urgent Fury*.[321] In *Urgent Fury*, the United States claimed that protection of U.S. citizens was an independent justification for the use of force when the host nation could not or would not protect them.[322] Nevertheless, whether the United States characterizes forcible protection of its nationals abroad as self-defense or as a separate justification for the use of force, it operates contrary to the requirements of the UN Charter.

Humanitarian intervention is an evolving justification for the use of force. International law positivists deny that humanitarian intervention can justify the use of force absent a supporting Security Council resolution.[323] Others say that sometimes the actual or potential tragedy is so great that intervening without Security Council authorization is "illegal but legitimate."[324] The United States has participated in many humanitarian operations, although most have been authorized by the UN Security Council.[325] The United States intervened in Kosovo to stop the

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[317] *See supra* text accompanying notes 110–11 (*Mayaguez* rescue), 142 (*Operation Just Cause*), 237–38 (*Operation Enduring Freedom*), 262–64 (*Operation Iraqi Freedom*).

[318] *See supra* text accompanying notes 110–11 (*Mayaguez* rescue), 126 (*Operation Urgent Fury*).

[319] *See* Thomas C. Wingfield, *Forcible Protection of Nationals Abroad*, 104 DICK. L. REV. 439, 461–62 (2000); Randelzhofer, *supra* note 36, at 798; BROWNLIE, *supra* note 36, at 301.

[320] Behuniak, *supra* note 102, at 119.

[321] MOORE, *supra* note 119, at 128.

[322] *Id.*

[323] *See, e.g.*, GEOFFREY S. CORN, VICTOR HANSEN, RICHARD B. JACKSON, CHRIS JENKS, ERIC TALBOT JENSEN & JAMES A. SCHOETTLER, JR., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 27 (2012); Roberts, *supra* note 222, at 185–86 (noting that humanitarian intervention was considered as justifiable use of force during the drafting of the UN Charter, but was not included in the text).

[324] William C. Bradford, *"The Duty to Defend Them": A Natural Law Justification for the Bush Doctrine of Preventive War*, 79 NOTRE DAME L. REV. 1365, 1464 n.402 (2004).

[325] *See supra* text accompanying notes 172–74 (Somalia), 207–08 (Bosnia), 270, 273 (*Operation Odyssey Dawn*).

brutal suppression of Kosovar Albanians without UN sanction, suggesting that the United States is willing, in at least some circumstances, to justify the use of force for humanitarian purposes.[326]

B. Domestic Considerations

While the law of *jus ad bellum* is generally concerned with international law, the decision to use armed force involves many domestic considerations as well. National security policy formulationresponsibility is divided between the executive and legislative branches, but the dividing line is not well-defined and there is frequent tension between the political branches over the proper scope of their authority. The Constitution vests the President with the executive power, which includes primary responsibility for foreign affairs, and makes him Commander in Chief of the armed forces.[327] The Congress has the power to declare war, establish an army and a navy, and make rules to govern and regulate the armed forces.[328] When the President makes the decision to use force in international affairs[329] he must consider the extent of his authority and the potential for infringement on congressional authority.

1. National Interest

Historically, the President has asserted a constitutional authority to commit U.S. armed forces abroad to protect important national interests (short of war) without prior congressional approval.[330] Important U.S. national interests that have been consistent over time include protection of U.S. territory, people, and institutions; promotion of U.S. economic

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[326] *See supra* text accompanying notes 221–22.

[327] U.S. CONST. art. II, §§ 1, 2; THE HERITAGE GUIDE TO THE CONSTITUTION 179–80 (Edwin Meese III et al. eds., 2005).

[328] U.S. CONST. art. I, § 8.

[329] Although the war powers are shared by the executive and legislative branches, the decision to use armed force is the President's. Congress has never declared war or authorized the use of military force without a presidential request.

[330] *See, e.g.*, Memorandum Opinion, *supra* note 267, at 6; Memorandum Opinion, *supra* note 240, at 8 ("Our office has taken the position in recent Administrations, including those of Presidents Clinton, Bush, Reagan, Carter, and Nixon, that the President may unilaterally deploy military force in order to protect the national security and interests of the United States."); Proposed Deployment of United States Armed Forces Into Bosnia, *supra* note 209, at 4–5.

well-being; promotion of democratic values; and global stability.[331] For example, the United States justified the *Mayaguez* rescue and *Operation Urgent Fury* as furthering the vital national interest of protecting the United States and its citizens.[332]

The United States has also invoked support for the United Nations as a national interest justifying the use of force. President Truman committed U.S. troops to the defense of South Korea because he determined that protecting the UN's effectiveness was an important national interest.[333] Presidents have also asserted support for the UN as a national interest in justifying deploying troops to Somalia, Haiti, Bosnia, and Iraq in 2003.[334] The United States has asserted prevention of civilian massacres[335] and prevention of the use and proliferation of chemical weapons as national interests justifying the use of force.[336]

National interests can also develop as a crisis evolves. For example, the 1994 National Security Strategy Report declared that the war in the former Yugoslavia did "not pose an immediate threat to our security or warrant unilateral U.S. involvement."[337] Later that year, President Clinton declared that the security of Central Europe, including the former Yugoslavia, was vital to U.S. national interests.[338]

Furthermore, Presidents have asserted authority to use force to protect "important" national interests, suggesting that there are other national interests that are not important enough to justify the use of force.[339] Scholars have proposed several different models for the

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[331] Alan G. Stolberg, *Crafting National Interests in the 21st Century*, *in* 2 U.S. ARMY WAR COLLEGE GUIDE TO NATIONAL SECURITY ISSUES: NATIONAL SECURITY POLICY AND STRATEGY 13, 15–16 (J. Boone Bartholomees, Jr., ed., 5th ed. 2012)

[332] *See supra* text accompanying notes 110–11 (Mayaguez), 126 (*Operation Urgent Fury*)

[333] *Authority of the President to Repel the Attack in Korea*, *supra* note 51, at 176.

[334] *See supra* text accompanying notes 175–78 (Somalia), 200 (Haiti), 209 (Bosnia), 265 (*Operation Iraqi Freedom*).

[335] *See supra* text accompanying note 277.

[336] *See supra* text accompanying notes 285–86.

[337] THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY OF ENGAGEMENT AND ENLARGEMENT 21 (1994).

[338] William Jefferson Clinton, *Implementing the Bosnian Peace Agreement: Let Us Lead*, http://www.presidency.ucsb.edu/ws/index.php?pid=50808&st=&st1=.

[339] SAM C. SARKESIAN, JOHN ALLEN WILLIAMS & STEPHEN J. CIMBALA, US NATIONAL SECURITY: POLICYMAKERS, PROCESSES & POLITICS 7 (4th ed. 2008). Presidents have also used the adjectives "paramount" and "vital" to describe those interests that justified the use of force. 23 DEP'T ST. BULL., *supra* note 51, at 176–77 (justifying the use of force in

gradation of national interests, but they all boil down to two categories: those a nation will go to war over and those over which it will not.[340]

Just as national interests can develop as a crisis evolves, they can also diminish, such as when the nation declares certain interests to be vital, but then fails to enforce those declarations. This can occur in two instances. First, the nation can declare certain interests to be vital in some circumstances but not in others.[341] Second, because the term "national interest" invokes strong reactions from the public and policy makers and because "national interests" receive resources, there is an incentive to label issues as national interests that do not fit the definition or to raise legitimate national interests to the "important" or "vital" level for arbitrary or political reasons.[342] In either case, failure to act in defense of stated interests may cause potential adversaries to mistakenly assume that the United States will not act in similar circumstances, which could lead to conflict.

2. Congressional Concurrence

Although the executive branch has consistently argued that it possesses broad power to unilaterally order the use of armed force, it has also recognized that congressional concurrence adds legitimacy to the decision. The most forceful form of congressional concurrence is a declaration of war, a tool that has only been used eleven times in the history of the United States and not since 1942.[343]

More recently, Congress has signaled its consent through legislation authorizing the use of military force short of a formal declaration of

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Korea to protect the "paramount" interest of supporting the UN); THE WHITE HOUSE, A NATIONAL SECURITY STRATEGY FOR A NEW CENTURY 5 (1998) ("We will do what we must to defend these [vital] interests, including—when necessary—using our military might unilaterally and decisively.").

[340] MICHAEL G. ROSKIN, NATIONAL INTEREST: FROM ABSTRACTION TO STRATEGY 9 (1994), http://www.strategicstudiesinstitute.army.mil/pdffiles/pub356.pdf.

[341] P. H. Liotta, *To Die For: National Interest and Strategic Uncertainties*, PARAMETERS, Summer 2000, at 46, 51. For example, in Kosovo and Somalia, the United States asserted prevention of genocide as one of the national interests used to justify intervention. James F. Miskel, *National Interests: Grand Purposes or Catchphrases?*, 55 NAV. WAR. COLL. REV. 96, 100–01 (2002). However, when genocide occurred in Rwanda, the United States was not willing to back up its interest with force. *Id.* at 101.

[342] JAMES E. BAKER, IN THE COMMON DEFENSE 15 (2007).

[343] ELSEA & GRIMMETT, *supra* note 164, at 4.

war.[344] The legislative and executive branches view authorizations for the use of military force (AUMF) differently. Congress considers an AUMF a prerequisite to the use of armed force abroad, except in limited circumstances when specific authorization may be granted after the fact but is nonetheless required.[345] The executive views AUMFs as a measure of legitimacy, showing that both political branches are united in a course of action.[346] When requesting AUMFs, Presidents refer to them as measures of congressional support, not authorization. When President George H.W. Bush requested congressional support for *Operation Desert Storm*, he made it clear in his request that he did not consider legislative authorization necessary.[347]

Finally, Congress can take affirmative action in opposition to the use of U.S. armed forces as well. Through its spending power, Congress can refuse to provide funding for operations of which is disapproves.[348] In the 1980s, for example, Congress enacted a series of "Boland Amendments" that restricted U.S. operations against the Sandinista government in Nicaragua and U.S. support for anti-Sandinista rebels.[349]

Congress is reluctant to enact restrictive legislation once U.S. armed forces are engaged in combat. A notable exception was congressional action to end U.S. involvement in Vietnam. Through a series of bills in the early 1970s, Congress imposed increasing restrictions on U.S. operations in South East Asia,[350] ultimately cutting off all funding to

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[344] *Id*. at 8–19.

[345] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243 § 3(c), 116 Stat. 1498 (2002); Authorization for Use of Military Force, Pub. L. No. 107-40 § 2(b), 115 Stat. 224 (2001); Authorization of the Use of U.S. Armed Forces Pursuant to U.N. Security Council Resolution 678 with Respect to Iraq, Pub. L. No. 102-1 § 2(c), 105 Stat. 3 (1990).

[346] *See* ELSEA & GRIMMETT, *supra* note 164, at 12–13.

[347] *Id.*

[348] Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 835–36 (1994); BAKER, *supra* note 342, at 102.

[349] Raven-Hansen & Banks, *supra* note 348, at 857–61.

[350] The 1970 Department of Defense Appropriations Act provided, in part, that "none of the funds appropriated by this Act shall be used to finance the introduction of American ground combat troops into Laos or Thailand." Pub. L. No. 91-171, § 643, 83 Stat. 469, 487 (1969) (An amendment to the Special Foreign Assistance Act of 1971 provided that "none of the funds authorized or appropriated pursuant to this or any other Act may be used to finance the introduction of United States ground combat troops into Cambodia, or to provide United States advisers to or for Cambodian military forces in Cambodia."). Pub. L. No. 91-652, § 7(a), 84 Stat. 1942, 1943 (1971).

"finance directly or indirectly combat activities by United States military force in or over or from off the shores of North Vietnam, South Vietnam, Laos or Cambodia."[351]

For better or worse, Congress has proven more unified in supporting presidential decisions to use force than in opposition. As Justice Jackson once observed, "We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."[352]

3. War Powers Resolution

As discussed in Part III.A.4 above, the War Powers Resolution does not resolve the debate over the scope of legislative and executive authority in the use of armed force, but it has inserted an additional consideration in the executive decision to use force. This is evident in the consistent statements that presidential action is taken "consistent with" the War Powers Resolution, if not in accordance with it.[353] The legislative branch is justifiably protective of its authority in national security matters and the Congress, or individual members, may challenge an executive decision perceived to be taken without congressional input or consent.[354]

United States Presidents have consistently regarded the War Powers Resolution as unconstitutional and have sidestepped its requirements, and Congress has failed to take decisive legislative action asserting its authority in this area. Neither side seems willing to engage in a showdown over the Resolution, and the Supreme Court has refused to decide the conflict between the other two branches of government.[355] As a result, the War Powers Resolution serves more as a source of legitimacy than law. Presidents like to have congressional support for

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[351] Joint Resolution Making Continuing Appropriations for the Fiscal Year 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130, 134 (1973).
[352] Youngstown Sheet & Tube Co. et al. v. Sawyer, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).
[353] GRIMMETT, *supra* note 98, at 14.
[354] *See, e.g.*, Campbell v. Clinton, 203 F.3d 19 (D.C. Cir. 2000); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990); Conyers v. Reagan, 578 F. Supp. 323 (D.D.C. 1984). Although individual members of Congress have not been successful in War Powers litigation against the executive branch, cases like these can raise legitimacy issues for a President seeking to justify a use of force decision.
[355] *Id.*

their actions and so will act consistent with the War Powers Resolution and will ask Congress for legislation supporting the use of force even while claiming that doing so is not necessary. Congress, for its part, is not satisfied with legislation supporting a use of force decision, and adopts resolutions authorizing the use of force pursuant to the War Powers Resolution.

V. Conclusion

The UN Charter's use of force framework does not present a practical legal obstacle for the United States to use force in its international relations, but there are factors that add to or detract from the legitimacy of such a decision. The United States has shown that it will use armed force in situations in which the UN Security Council has not authorized it, indicating that the United States does not feel bound by the Charter's requirements. However, the United States has sought Security Council authorization when it thinks it can achieve it because a Security Council Resolution adds international legitimacy to a military operation. Similarly, the United States often has the capability to conduct unilateral military operations, but nevertheless prefers to operate as part of a coalition of nations. The added legitimacy of having international partners outweighs some of the difficulties inherent in coalition operations.[356]

Instead of a bright line demarking the legal limit of the United States' use of force in international relations, there is a spectrum of authority that can be compared to Justice Jackson's formulation of executive power in domestic law. When the United States acts in accordance with a UN Security Council Resolution authorizing the use of force, and acts with coalition partners, and when the executive and legislative branches are in agreement as to the course of action, its legitimacy is "at its maximum."[357] When the executive acts unilaterally, without support of the UN Security Council, other nations, or the Congress, it may have legal authority to do so, but its legitimacy is "at its lowest ebb."[358]

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[356] Helis, *supra* note 311, at 171.
[357] *Youngstown*, 343 U.S. at 635.
[358] *Id.* at 636.

THE SECOND SGM JOHN A. NICOLAI LEADERSHIP LECTURE*

SGM (RETIRED) GUNTHER M. NOTHNAGEL[1]

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* This is an edited transcript of a lecture delivered by Sergeant Major (Retired) Gunther M. Nothnagel to members of the staff and faculty, and their distinguished guests, on June 11, 2013.

The Sergeant Major (SGM) John A. Nicolai Leadership Lecture is named in honor of Sergeant Major John A. Nicolai, who served as the Sixth Sergeant Major of the JAG Corps, U.S. Army, from April 1, 1992, to August 16, 1994, during the time Major General (Retired) Nardotti was The Judge Advocate General.

Sergeant Major Nicolai entered the U.S. Army in June 1964 and graduated basic training at Fort Leonard Wood, Missouri. He completed advanced individual training at Fort Sam Houston, Texas, as a Medical Corpsman. After serving as a medic at Fort Hood, Texas; Minneapolis, Minnesota; and Fort George G. Meade, Maryland, he separated from the Army in August 1968. He re-entered the Army in November 1970, and again served as a medic at the Armed Forces Examining and Entrance Station in Fargo, North Dakota, and the U.S. Army Medical Department Activity–Korea. His request for reclassification as legal specialist was approved in 1974 and he was assigned in that capacity as the Noncommissioned Officer (NCO) In Charge (NCOIC), Criminal Law Division, U.S. Army Air Defense Center and Fort Bliss, Texas; Clerk of Court, 3d Judicial Circuit, Fort Bliss, Texas; NCOIC Administrative Law Division, 8th Infantry Division, Germany; Chief Legal NCO, 7th Medical Command, Germany; Chief Legal NCO, U.S. Army Garrison, Fort Huachuca, Arizona; Chief Legal NCO, 8th Infantry Division, Germany; and as Chief Legal NCO, I Corps and Fort Lewis, Fort Lewis, Washington.

He was a graduate of the Sergeants Major Academy, Class 32, and completed the Legal Advanced NCO Course and the U.S. Air Force Advanced Legal Course. He earned an Associate of Arts Degree from the University of Maryland and a Bachelor's Degree in Business Administration from the University of Phoenix.

His awards include four Meritorious Service Medals, the Joint Service Commendation Medal, two Army Commendation Medals, and the Army Achievement Medal.

A native of North Dakota, he was married to Kathleen Schaffer of Minnesota, and had three daughters, Christine, Monika, and Catherine.

On April 1, 1992, Sergeant Major Nicolai assumed the position as Sergeant Major, the Judge Advocate General's Corps, and was the sixth sergeant major to hold this position.

[1] Sergeant Major (Retired) Gunther M. Nothnagel served as the Third Regimental Sergeant Major from 1985–1986.

His assignments included: Chief Legal Noncommissioned Officer (NCO), 1st Army, Fort Meade, Maryland; Chief Legal NCO, United Nations Command and 8th Army, Korea; Chief Legal NCO, U.S. Forces Command (FORSCOM), Fort McPherson, Georgia; Judge Advocate General's Corps (JAGC) Liaison to Military Personnel Center (MILPERCEN), Alexandria, Virginia; Chief Legal Instructor, Fort Benjamin Harrison, Indiana; Chief Legal Clerk Instructor, U.S. Army, Europe (USAREUR) & 7th Army, Germany; Chief Legal NCO, Criminal Justice Division, USAREUR & 7th Army, Germany, Legal Clerk, U.S. Army Training Center, Fort Benning, Georgia; Senior Court Reporter, 101st Airborne Division, Vietnam; Senior Court Reporter, Fort Campbell,

It is certainly a pleasure for me to be here today. You will have to pardon me; it is a bit of nostalgia for me to be here. I first arrived here so many years back, it is kind of hard to remember now—it was 1972 when Charlottesville—the outer end of Charlottesville is now where K-Mart is, if that tells you anything. It has grown. I mean, it is unbelievable.

Our first conference that I went to here was a warrant officer/senior NCO conference; and it was not even held at the school because the school was not here. The school was up at the campus for the college. We had our classes in an old theater in Charlottesville. That was the start of my first visit here. Unbeknownst to me, I would be coming back here many times, and I grew a great fondness for this place.

I would like to speak to you today about leadership, because while many changes have taken place since I have been out—and obviously you can see I have been out of the Army for twenty-seven years—I am not up to date on the technologies that you are now using. I am not as smart as you are, because your training is much better than mine was. But I would like to share some things with you that made you what you are today because there were many of us like me who contributed to get you to where you are. So bear with me as I go through some of the places that I have been and some of the things that I have been privileged

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Kentucky; Legal Clerk, 35th Artillery, Fort Carson, Colorado; Legal Clerk, 39th Artillery, Dachau, Germany.

His awards include the Legion of Merit; the Bronze Star, Four Meritorious Service Medals, Four Army Commendation Medals, Army Good Conduct Medal (8th award), National Defense Service Medal, Republic of Vietnam Campaign Medal, Vietnam Service Medal (5), Republic of Vietnam Gallantry Cross Unit Citation with Palm, Meritorious Unit Citation, NCO Professional Development Ribbon (5), and Army Staff Badge.

His military education included the Sergeants Major Academy, 1981, Class 16; Advanced Noncommissioned Officer Course, Basic Noncommissioned Officer Course Army NCO Academy.

His civilian education includes a B.S. from the University of New York.

Sergeant Major Nothnagel is married with three daughters.

In reviewing this article for publication, author noted the following: "It came to mind that none of us will ever have a successful career without mentoring from those around us. While I thank the many officers and NCOs who contributed to my career, I would like to dedicate this article to CW4 John L. MacIntyre, JAG Corps (deceased), who taught me to always do more than what is expected; to CW4 Alzie Ramsey, JAG Corps(deceased), a gentle giant who always treated his subordinates with respect and dignity; and to Major General Persons, Jr., Major General Suter, and Major General Overholt and all who gave me the opportunity to lead and make the Corps a better place."

to do that have made your careers much better than what they might have been.

First and foremost, I do want to set aside a rumor that I worked as a paralegal for the first Judge Advocate General of the Army; that is not true. I did, however, join the Army in 1962. I am an immigrant. With a name like Gunther Nothnagel, you can guess where I am from. I like immigrants. Immigrants are what make this country work. We are all immigrants, are we not? The further we look back; our parents and our grandparents came over here. Now I am looking forward as they solve the problems we have with immigration in this country, but I would do it in a simpler way. First of all, I would ask them to sign a Pledge of Allegiance, pay their taxes, and take a test. And the test would have one question on it, and the question would be: If you are using a cell phone, which side of the road should you be driving on? Now, if you pass that question, you can become a citizen of this fine country.

Starting out, my mother brought me to this country when I was about 14 years of age. I spoke about three words of English. I ended up in Biloxi, Mississippi and I graduated from Biloxi High School in 1960. That tells you there is some vintage here, does it not?

After high school, I went off to get a college education, but I kind of ran out of money. Back in those days, we still had the draft. So I was thinking about working on the oil rigs in Louisiana. And a man said, "I would gladly hire you, except I will put all of this training in you, okay, and you are going to get drafted and you are not going to be of any use for me. So, in essence, why not you get your military service over with." And I saw the friendly Army recruiter. Of course, he promised me much more than I could have imagined, but it has turned out to be a wonderful choice. As you can see, I spent twenty-four years with the Army, ending up in the Judge Advocate General's Corps.

I am here to tell you, based on my experience; you could not be in a better part of the Army. Am I right, or not? Never forget that, because many have gone before you to make this a better place. I started out in basic training at Fort Gordon, ended up at Fort Dix for AIT, as a radiotelephone operator. How exciting is it, climbing telephone poles? Did you ever slide down one of those things? Guess what happens to you? You will be walking bowlegged the rest of your life. It did not sound too appealing to me, but I got what I wanted. I wanted to be assigned to Germany.

Being German, I speak German. I ended up in an artillery outfit, 39th Artillery, located in Dachau, Germany. Interesting unit for its time. Atomic cannon. Have you ever seen an atomic cannon? You might have seen atomic cannon in the old newsreels. They had two two atomic cannons in Battery, B, 3rd Gun Battalion, 39th Artillery I was placed under the supervision of a Staff Sergeant by the name of Danny Tillman. It is funny how you remember certain people. It is either what they do *for* you or do *to* you.

Danny Tillman, I got to like the man; I did not like him at first. I was up on a gun platform. Back in those days it did not matter what you were trained in, they put you where the Army needed you. Danny Tillman thought he was going to make a gunner out of me, and was he ever wrong. I was up on a gun platform. I handed him the wrong wrench. He kicked me in the rear, and I flew off the platform. Would you call that authoritarian leadership? You betcha. I was thinking to myself there had to be better things in store for me in my illustrious Army career. But fear not, the Army discovered that I could type, a wonderful thing to be able to do back then before the advent of computers and electric typewriters—so I became the battery clerk. Now, when you are the battery clerk in a line unit, that is pretty good living. Then the battalion commander discovered that I spoke German; I became his driver, radio/telephone operator and translator during field maneuvers. I was also assigned to the S1 of the 35th Artillery, and the Battalion Commander made me the S1 Clerk. There, I ran into the first person to mentor me and that was Sergeant Major Bivens, a combat veteran of World War II, a fine man.

It was a different Army back then. Back then the Army simply placed you were they needed you, gave you on the job training (OJT), if you were lucky, and did not care what you were trained to do in basic training. As the S1 Clerk and the OJT, this is what gave me my first experience as a legal clerk, paralegal. It should be noted that the S-1 clerk was responsible for the courts and boards and Article 15 actions within a battalion. I received about a five-minute briefing from the guy who had the job before me and now I was in charge of the courts and boards actions of the Battalion. At times, I did not know what the hell I was doing, but I did the best I could and prayed to God that it would turn out okay.

The first board I ever took involved a staff sergeant, a Korean War combat veteran who was an alcoholic. Back in those days, the Army did

not look at that as being an illness. They boarded these soldiers out. I learned how to prepare summary courts-martial and special courts-martial records of trial along with preparing Article 15 actions. Our next higher headquarters was in Stuttgart, many miles away. And so, learning how to do these things entailed reading the *Manual for Court-Martial*—the 1951 version at that time . . . The *Manual for Court-Martial* was not the easiest way to learn the proper administrative procedures in processing legal forms and documentation. There were no handy-dandy guides of how to type out an Article 15, prepare a summary or special court-martial record of trial, or how to format a board proceeding. Basically, you copied or used the same format from a previously filed case. At times you would have to call higher headquarters for assistance and certain actions had to be forwarded for review along with cases of appeal. It should be noted that there was no MOS-producing Legal Clerk School at that time in the Army, and all enlisted soldiers received their paralegal training through OJT. So this is the way I started out my career in the legal field as a paralegal.

My parent unit, the 39th Artillery, was deactivated and I rotated back with the 35th Artillery to Fort Carson, Colorado. At Fort Carson I ran into somebody who would mentor me, and that was a JAG warrant officer by the name of John Shreiber. Mr. Shreiber was the first person to show me how to properly transcribe a record of trial along with teaching me fundamentals of legal administration. Even as old as I am and having served in the military for twenty-four years, you remember people who make a difference in your life and make you a better soldier.

The first thing that you have to learn is that knowledgeable people around you can empower you, do they not? Just like when you come here, are you not empowered by the things that you learn here? Now, leadership dictates that when you leave here with this knowledge, that you empower other people with that knowledge. You should also note that the many things that you learn in the military you will also use when you get out in civilian life. At times we study leadership to death. Have we not all learned the traits of leadership? Do we not love to watch George Patton; you know, in *Patton*, the movie? Is that not a wonderful film?

I met Five Star General Omar Bradley at the Sergeants Major Academy. He was still alive then, a very impressive figure, gave a wonderful speech. But let me get back to as I transitioned from one stage to the next in regard to my career.

I ended up with Mr. Shreiber teaching me—pulling me down to the post JAG office—showing me how to format board transcripts and special court-martial records of trial. I also learned the many functions of a JAG office by working with various staff members within the post JAG office and I established a rapport between our battalion and the JAG office. Overall, my job as the battalion legal clerk for the 35th Artillery was very rewarding. I was awarded the MOS of 71D, as the MOS was known back then and promoted to the rank of Specialist 5 within a two-year period. At that time, you could only go as high as E5 at the battalion level in the paralegal MOS. Eventually I transferred, and I ended up at Fort Benjamin Harrison in Indianapolis, Indiana, and I took a course in finance.

I fell in love with Fort Benjamin Harrison; I liked the place. Let me tell you this, when I was at Fort Ben Harrison, the mothers used to bring their daughters out to the post to meet the nice GIs. Can you imagine that? I mean, this is like being a wolf in a chicken coop. And I never forgot the place. The people were so kind in Indianapolis, and I always wanted to go back there.

Anyway, after graduating from the finance course, I was transferred to Fort Campbell, Kentucky. Fort Campbell was not a very impressive place while I was stationed there. They had the old World War II barracks. Back then the Army was heating with coal, and all of the buildings on post that had been painted white actually looked black due to the coal dust. At in-processing at Fort Campbell, Master Sergeant Plaskowski, from the post JAG office discovered that I had experience as a paralegal. Due to a great shortage of legal clerks, I was transferred to the garrison side of the post JAG office.

Fort Campbell opened up a whole new world for me because of the 101st Airborne Division. At that time the JAG office at Fort Campbell was staffed with both division and garrison JAG personnel. Originally, I was assigned to the garrison side of the house since I was not a jumper, meaning that I was not airborne qualified. I was not crazy enough to jump out of a perfectly good airplane. That was not my thing in life, but I admired people who did. I got to work at the different sections within the JAG office such as ad law, claims, legal assistance, helping people who came in with different problems and so on. It truly opened up a whole new world and I really enjoyed my job.

And there were some interesting JAG officers serving there at that time. To mention one, Colonel Reid Kennedy was our SJA. Mr. Borch, the Corps Historian has a display out in the hallway about Reid Kennedy. Does that tickle something in your mind? The My Lai incident. He was the military judge at the trial of Lt. Calley. At that time, we also had as deputy SJA Major Hugh Overholt, a future judge advocate general.

That should teach you something here. When you go back to your units, you need to look after your junior officers; you need to mentor the young officers of the Corps. You need to be nice to them because one day, you might end up working for them when they are up in a higher grade or become general grade officers.

At that time, promotions to the grade of E6 were hard to come by since there was no personnel management at the DA level for legal enlisted personnel. One would have to compete against all of the other MOSs at an installation and at that time, Fort Campbell had a lot of Korean War vets who were also trying to get promoted. I needed to make E6, and the only way I could make E6 was to volunteer to go to court reporter school. Now, you might think that is not a big deal. But with a German name like Gunther Manfred Nothnagel, my English was not the greatest. And what do you need to know when you go to court reporter school? English.

My warrant officer and mentor Mr. John L. McIntyre informed me that if I ever had any intention of becoming an E6, I had to volunteer for court reporter training at the Naval Justice School in Newport, Rhode Island. Off I went to the Naval Justice School and graduated. I did not graduate with honors, but I made it. Several months later, I received my promotion to Specialist Six.

About that time a master sergeant transferred in from the 173d Airborne from Vietnam. This man had combat experience and took over the position of Chief Legal Clerk for the 10st Airborne Division. He had spent a year of combat in Vietnam. The 101st Airborne Division was alerted for movement to a classified area. When a division gets alerted for overseas deployment, it can suck out anything it wants from an installation and take with it what it needs as it rotates out. Due to shortages of court reporters within the Army, I was transferred to the 101st and that is how I ended up in Vietnam.

The beauty of transferring out as a unit was that we became family. A beautiful thing; awe-inspiring. What was even more amazing is that rank did not matter; we just became dependent upon each other as fellow human beings. We all contributed. We started out at a place called Binh Hua. Interesting time of the year, 1968, springtime in Vietnam. Guess what happens? Tet came on. At that time our JAG office was located at the end of the the runway at Bien Hoa airbase. The Vietnamese decided that they wanted to overrun the defenses of the airbase at about two in the morning. Everyone was issued weapons and sent to the berm. It did not matter whether you were a court reporter, a colonel, or whatever; we were all out there ready to sling lead. Luckily for us, they tried to take the end of the airbase, and hit the Air Force side of the base. My compliments to the Air Force security team—they beat them back. After several days things became normal again.

At about that point in time the Marines were leaving what then became Camp Eagle near Hue Phu Bai which was close to the old imperial capitial of Hue. I was sent with the advance party to Camp Eagle to establish our JAG office in a giant CP tent. A word of thanks needs to be said to our experienced Chief Legal NCO, who well prepared us for our transfer to the northern part of Vietnam and for his scrounging ability.

Court reporting was very interesting in Vietnam. Took several cases in tents with helicopters making all kind of noise and incoming rockets exploding. Since I used a stenomask connected to a Sony recording machine, I was never quite sure of the supply of electricity that was provided by local gasoline generators. Due to shortages of court reports in Vietnam, I got to travel and take verbatim court-martial and board cases at different Army units all over Vietnam. The prime mover in Vietnam was the helicopter. I got to see wonderful places there: Bien Hoa, Nha Trang, Saigon, Hue, and a lot of places in the middle of nowhere that were fire bases.

Now, we all left Vietnam at about the same time. The sad part is, at this point I felt that I left my family and my family left me. Our office in essence had worked together for a period of two years and we were a team. From Vietnam I was transferred to Fort Benning, Georgia. It was a whole new start. The JAG office at Fort Benning, Georgia, did not need me because they had converted their court reporter spaces to TDA positions and civilianized their court reporter positions. I ended up at Fort Benning in a place called Sand Hill. Sand Hill is as described. Our

office was an old World War II shack. There were three of us, an E7, myself as an E6, and then an E5 who acted as our secretary. The work was boring, capital B-O-R-I-N-G. I had to get the hell out of there. You know, when you have been to the mountain, how can you go back to the valley? You cannot. So basically what I did—thanks to the good leadership of the E7 NCO in charge, we started doing correspondence courses. In about a year, I completed every JAG correspondence course on Legal Administration that the JAG School had. That is what kept our sanity. Finally I was picked up on orders and transferred to U.S. Army—Europe (USAREUR) at 7th Army Headquarters Patton Barracks, in Heidelberg, Germany. Hard-core assignment, right? Big time—I have arrived. I ended up working in the JAG office. I got to work in my favorite area, military justice and criminal law. Loved it, every minute of it. Great officers and DA civilians. We all bonded.

A fellow veteran 71D E6 in our office that was our Admin NCO would often discuss with me what the JAG Corps should be doing for its enlisted personnel. At that time there was no MOS-producing school for our MOS, and to make matters worse, promotions beyond E6 was very limited due to the Army force structure. Additionally, there was no career management for our legal enlisted personnel. Since he applied and was accepted as a JAG Warrant Officer, he was transferred to USAREUR Headquarters in Heidelberg working for the USAREUR one-star Judge Advocate General. Several months later, I received a phone call that the USAREUR JAG General wanted to interview me and discuss the creation of a paralegal course within USAREUR. At that meeting the General informed of his desire to improve the quality of legal administration within the command by establishing a course for paralegals in Oberammergau, Germany. Long story short, I accepted the offer to start the school and it became a huge success within USAREUR. I would like to add that taking on that assignment was a huge risk. One has to learn that if you fail to take on risks, you might never get the reward. And the reward for a job well done turned out to be awesome for me. I also discovered that I was good at mentoring soldiers and enjoyed being an instructor.

At about the same time, Fort Benjamin Harrison started out with Chief Warrant Officer John Shreiber, back from my Fort Carson, Colorado, days, creating the first paralegal 71D-MOS producing course for the Army.

During an inspection visit, General Persons asked if he could do anything for me. I volunteered to become an instructor at the MOS producing course back in the states. Just before rotating back to states I received my promotion orders for Specialist Seven out of the secondary zone and transferred to Fort Benjamin Harrison, Indiana. There, I replaced a master sergeant that I would call R.O.A.D, retired on active duty. There is nothing worse in the Army, or anywhere else, than when you have got to go to work for somebody that is retired on active duty, a person who is just there for a paycheck. It is a disservice, a total disservice. It is a total disservice to the Army and our country. But what do you do? You are going to run into bad leaders, are you not? You have to work around it, you have to work over it; under it, any way that you can, and get the hell out if you need to, but do what you need to do. I knew I could outwait him. And outwait him I did. He was transferred to his terminal assignment and I became the chief legal NCO.

With new replacement officers and enlisted paralegal instructors, we reinvented the basic paralegal legal MOS-producing course. I was also able to use much of the material that was originally developed at my prior duty station. We came together as a group. We wrote new self-test booklets. We wrote new self-paced guides, booklets, and television video program instructions. We did innovative things that I did not think were possible. But I did not do it all; it was the people that worked for me who did it. What I learned to do early on in my career is that if you empower people who work under you and you set expectations, you can accomplish great things. Never forget that is your charge as an NCO. Mentor—you must mentor your subordinates. And you must also stay in touch with your fellow NCOs. The JAG Corps is a small family within the overall Army family. It often will help you to know each other in case you need assistance in performing your duties. In this age of high technology, it is easy to stay in touch and support each other.

I need to share something with you that at my age I am not too crazy about many of the technological changes that are coming at me. I was on a tour bus in Egypt. Egypt is still a very dangerous place. We had a policeman with us, and he carried a machine gun. We were going to Saint Catherine's, a monastery, near Mount Sinai when the bus broke down. It was ten at night, pitch dark out in the middle of nowhere. I am sitting there wondering how this is all going to play out. You do not want to be sitting out in the middle of the desert in the middle of the night with people that you really do not know. As I looked over across from me, and I noted a woman sitting with a Samsung tablet, and she

was communicating back home to America with this tablet. Our bus had Wi-Fi capabilities through satellite. I am going to have to buy one of those tablets for my future trips to stay in contact with the outside world. The reason I was fascinated with what I saw was that it made me think of Vietnam when the average letter took well over a week to get to you.

After I got out of the Army, I went to work for an engineering company and our headquarters was in Atlanta, Georgia. I never forgot the speech that our communications director gave us. He said, with technology, you either go with it or you become road kill on the road of technology. And there is truth in that. You have to use it. I mean, now I check my checking account, investments, anything and everything over the Internet. It is become part of us. We cannot do without it. We all need to stay up-to-date with the changes in technology.

Anyway, let me skip back to my time at Fort Benjamin Harrison. One day, a young colonel from OTJAG at the Pentagon came out to visit us; he wanted to see how well our paralegal course was going. I found him to be a very interesting person. His name was Colonel Suter. Major General Suter, as he was to become, asked many questions. We discussed problems with the assignment process of enlisted personnel, people not going where they needed to go, and career enhancement of enlisted personnel. I made some suggestions and I thought I would never hear from him again.

One day I received a call, and was asked if I would like to volunteer to go to Washington, D.C. They were thinking about assigning a 71D enlisted person at the Military Personnel Center (MILPERCEN). At that time MILPERCEN handled the career assignments and management of all enlisted paralegal personnel. I had to think about that one. What is the risk? Big time. If I do well, I will be fine; if I do not do well, I will be relegated to places unknown on the planet. More importantly, though, the Army did not pay as well as it does now. The Washington area is an expensive place and my quarters allowance at that time would only cover about half of what it costs to rent a place about 40 miles from where you worked. I hoped that my selection for promotion to Master Sergeant would cover the additional housing expenses.

MILPERCEN was an interesting place. The agreement went like this: My rater would be an Adjutant General Sergeant Major. I was expected to work in an advisory capacity at MILPERCEN. My reviewer was the Chief of PPT&O. But I lucked out. The MILPERCEN Branch

Sergeant Major took me under his wings and treated me like his long-lost son. I had to learn a lot of things. In that position not only did you have to know about assignment steps and processes, staffing guides, you had to know their system operated, and you had to know a host of Army regulations that I had never dealt with before. I was also in charge of the maintenance of personnel 201 files.

I sat on elimination and promotion boards. I refused to vote to eliminate any soldier that served 18 years, unless it was something really dastardly or outrageous, that he be kicked out of the Army. Why? Because he would not be entitled to retirement pay for the number of prior years he had served honorably. I learned about slots. I learned about job descriptions, their importance, budgeting, staffing guides and the importance of validating TOE and TDA staffing positions. It truly turned out to be a wonderful career, eye-opening assignment for me.

I do not know who does this job now for the enlisted side of the Corps, but whoever has that job, it is a hell of a good job, and you can do a lot of good for a lot of people—and I did.

We had to go clean up the MOS. And I will share this with you: When I looked at a personnel file and somebody was just hanging in, in other words "retired on active duty" I had a special place for them, and that was the Yuma Army Proving Grounds. We started to move people that were homesteaders. We rewarded soldiers with career enhancing assignments at places that they wanted to be. In other words, we put the "P" in personnel.

One thing I want to mention is that when I was at Fort Benjamin Harrison, great changes were taking place. We started getting more women in the military. That was a phenomenon. Why? Why were we getting so many women? Because we were changing over to become an all-volunteer army. The manpower pool dictated that the male force would not be available to meet the needs of the Army; therefore, the Army started recruiting more women. That brought in problems. I saw that later on in the assignment system, because we had mothers with children that if you put them on orders, guess what happen? They did not want to go. I would think that these problems have resolved themselves.

We had to make great changes to accommodate women in the Army. A lot of men did not want women in the Army. I am very pleased to see

a general officer here today, a female general officer. I never saw that in my whole career in the JAG Corps. It is a proud moment for you ladies out there, a very proud moment. The other thing is I have three daughters. My daughters deserve the same pay that any man does, would you not agree with that? And therefore, in the Army, they should be treated the same in all respects.

Anyway, my assignment at MILPERCEN turned out to be a truly rewarding assignment. I learned to see how the Pentagon operated. I had a great supervisor who later became a two star general. I learned many things, met many people. And at that point in time, I was thinking of getting out of the Service, but was selected to attend the Sergeants Major Academy. Whoa, that was a big moment for me. And the reason why it was a big moment for me was I was the first 71D/E legal clerk/court reporter selected to attend the Academy.

The Sergeants Major Academy is located at Fort Bliss, Texas. What I liked about the Academy is it made me get off of my laurels. Upon arrival you take a battery of academic examinations. Passing all of the tests with flying colors I was allowed to take college courses in addition to carrying a normal course load. It was not easy taking college courses at night in addition to your regular academics. The hard work paid off in that I finished two years of college work that I was unable to pay for before joining the Army. I received an Associate's degree from the El Paso Community College. The point I like to make is that it got me going again. I thought that if I can do well here, I needed to continue on because I was thinking about getting out of the Army in a couple of years. I needed more than just two years of college.

I am here to tell you folks, since this sequestering business is going to slow things down and you are not going to transfer as often, you need to work on your education and get all of the education that you can get before you get out of the Army. There are a lot of people that say you do not need a degree; that is malarkey. I am here to tell you, if you want a good job and there is competition for you out there, the average person just about, in the metropolitan area of Washington, D.C., needs to have at least a bachelor's degree. If you plan on being in management, it would behoove you to start working on a master's degree—you see what I am getting at? Now, I am not saying that everybody's got to be a college graduate, because we darn sure need good mechanics and other people that fix things or you want to follow your dream to raise horses, chickens, dogs, whatever you want to raise out there; but if you want to

get one and improve yourself, now is the time to do it. It will make you a better soldier, for one. It will make you more confident. It will allow you to do things that you would normally not otherwise be able to do.

Upon graduation from the Sergeants Major Academy, I was reassigned to HQ, FORSCOM. Forces Command at Fort McPherson, Georgia, controlled all of the combat units in the continental United States. What did I end up doing as a paralegal? Not paralegal work. Guess what? When you are assigned there, you work manpower structures, staffing guides, and validate JAG officer and enlisted positions for installations belonging to FORSCOM. It was very important work in that it was a constant struggle to validate and maintain JAG officer and enlisted positions within all of the installation in the continental United States. While stationed at Fort McPherson, I finished the requirements of a Bachelors Degree by going to night school.

The best unit assignment of my career was with the 8th U.S. Army, located in Korea. I really fell in love with Korea. The reason was that I was directly and indirectly in charge of seventy-seven enlisted paralegal within the command. The first thing my colonel said to me upon arrival was, "Sergeant Major, the enlisted personnel are yours, you take care of them." I liked to hear that. If you want to be a great officer, that is what you need to do for an NCO, put him in charge. To do otherwise is to do him wrong. You cannot develop good NCO's unless you put them in charge and hold them accountable.

I was in charge of seventy-seven people, and I had them all over Korea. I must have visited several times every unit that existed in Korea. We had MOS training throughout the command. I understand the Army no longer has the annual MOS test. I think the Army made a bad mistake by doing away with MOS testing. I like MOS testing in that it shows that you are proficient within your MOS and that you are also proficient at your skill level. Back in those days you received a monetary bonus if you scored high enough. I liked Korea so much I brought my wife over for a visit. For those of you that are married, a spouse certainly is an important ingredient to your career. I am blessed, I have been married since 1967 to the same woman, and she still fascinates me today. What I am trying to say is it is good to have family. Never forget your real family because they are a part of your career.

When I came out of Korea, I was assigned to First Army, Fort Meade, Maryland. First Army was an interesting assignment, because I

had never worked with the Reserves before. Do we have any folks here from the Reserves? My hat's off to you, it really is. I never thought that the Reserve components would take the brunt that they have in the last two wars of this country. I liked working with the Reserves; interesting, something new. And then eventually I ended up being the Regimental Sergeant Major. I went back to the Pentagon. I liked the job, I worked for wonderful people, I will never forget those people; but it was time for me to go. I also needed to make some money to get my kids educated, because I did not want them to start like me—in debt.

I received a wonderful job offer that I could not refuse. And the guy who recommended me to this retired colonel was a warrant officer, JAG warrant officer, named Dennis McCormick. I am sad to say he is no longer with us. I loved my career, and so what I want to leave you with is: Mentor yourselves, get all of the education that you can; but more importantly, to be a success, truly mentor other people and stay part of the family.

Thank you very much.

THE SEVENTH ANNUAL GEORGE S. PRUGH LECTURE IN MILITARY LEGAL HISTORY*

COLONEL FRENCH L. MACLEAN[1]

It is a high honor to talk to you today. In fact, you're the first group of lawyers with whom I have discussed this subject. And I told my father before I came out east from Illinois that I was going to be talking to a group of over a hundred military lawyers. He had been a Private First Class in the Hürtgen Forest and the Battle of the Bulge in World War II; he's not a lawyer either. And when I told him about how many lawyers I was going to speak with today, he said, "What kind of trouble have you gotten into this time?"

I am here today to tell you about mysterious murders that happened seventy years ago, about late night courts-martial, about a secret order on jury composition. I'm here to tell you about the mysterious hangman who drove around France wheeling an Army flatbed with a gallows on the back. I'm here to tell you about a death train moving bodies to a secret cemetery in the dark of night. That secret cemetery exists to this

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* This is an edited transcript of a lecture delivered on April 24, 2013 by Colonel (Retired) French L. MacLean to the members of the staff and faculty, distinguished guests, and officers attending the 61st Graduate Course at The Judge Advocate General's Legal Center and School, Charlottesville, Va. The chair lecture is named in honor of Major General George S. Prugh (1920–2006).

[1] A native of Peoria, Illinois, French L. MacLean graduated from the U.S. Military Academy in 1974. Commissioned as an Infantry officer, he served four tours of duty in Germany, commanded two companies and a battalion, and attended the School for Advanced Military Studies at Fort Leavenworth, Kansas.

During Operation Desert Storm, then-Major MacLean fought in Iraq as a battalion operations officer in a mechanized infantry battalion; twelve years later, in 2003, Colonel MacLean returned to Iraq as the historian for U.S. Army Fifth Corps during Operation Iraqi Freedom.

Before retiring from active duty, Colonel MacLean served as the Inspector General for the U.S. Army, Europe, and as a course director and professor at the National War College at Fort McNair, Washington, D.C.

A prolific author, French MacLean has authored the acclaimed *Custer's Best: The Story of Company M, 7th Cavalry at the Little Bighorn*, and ten books on World War II. The British historian Sir John Keegan wrote that MacLean's *Quiet Flows the Rhine* is "a most valuable study of the German Army in the Second World War".

The Fifth Field, Colonel MacLean's study of death penalty courts-martial in World War II Europe, was published in 2013. *The Fifth Field* won the Lieutenant General Richard G. Trefry Award, in the 2013 Army Historical Foundation Distinguished Writings Awards.

day and your General would have a hard time visiting it without special permission from Washington, D.C. My story today is about a time, back in World War II, when Judge Advocates were the big dogs on the porch. My story is about when giants walked the earth, but it's a complicated story.

In December of 1944, the Army's Deputy Judge Advocate gave a speech in Milwaukee positing that if he were a defendant and had to choose between a military or civilian criminal venue, his choice would depend on whether or not he was guilty. If he were innocent, he would ask for a trial by court-martial. But, if he knew that he were guilty, than a military courtroom is the last one into which he would want to walk. I reach the same conclusion after twelve years of researching ninety-six executions of military members in Europe during the aftermath of World War II.

I believe that now in the Judge Advocate General's Corps, as well as in Europe during World War II, are, maybe, the two most interesting times for Judge Advocates that we have known throughout history. We can learn a lot from what went on in World War II. And I think that future generations will look back at your work today learn that not only was the country fighting nation-state adversaries, but enemies that were not nation states that we would call terrorists.

From my perspective as a former Inspector General, sometimes you can follow all the rules; you can dot the i's and cross the t's legally, but if something looks bad, it will be addressed somewhere in the process. You'll hear some things today that do not look very good.

So no matter what you work with or what subject you tackle, someday somebody is going to find out about it. Colleagues will tell you: "This is secret. No dissemination. Keep it close hold." But these declarations cannot defend against an Inspector General or a Judge Advocate fifty years from now who is interested and goes through files knowing for what to look and finding answers. I am not implying that there are deliberate cover-ups, but simply that work will see the light of day at some point. Obviously, you cannot undo a death penalty decision once it has been carried out. But I think equally as important, is the effect on courts-martial panelists who knew that their death sentence actually had been executed.

I do not think history has done a good job preserving the effect on the psyche of these folks that are carrying out the judicial system. I would like to tell you about Sergeant Mosley who died in 1953; a big man, 6' 5", 230, from hardscrabble Eastern Kentucky. Sergeant Mosley escorted a number of prisoners from the flatbed truck to the scaffold. In one instance, in France, he and another military police officer, who was also a rather large fellow, allowed the prisoner one last cigarette before they took him to the gallows, which was completely against regulation. I interviewed an old Frenchman who remembered seeing them. It's the humanity he remembered. The Frenchman said those, physically, were the two biggest men that he had ever seen, but in the final moments of that one Soldier's life, they provided a little bit of kindness.

Well, Sergeant Mosley could only take so much. After a number of these executions—remember he is the biggest guy in the barracks—he starts to wet the bed at night. His gut starts to hurt, and they had to take him off of that duty and assign him to other duties. He died in his forties in 1953. I submit that a contributing factor to such an early death might have been the work he had to do with respect to these executions. At some point, historians need to examine that and find out what are the effects.

I believe that in contemporary debates and discussions about the death penalty in the United States, the military needs to weigh in because the death penalty in the military could be considered a little different than in the civilian system. I hope that these ninety-six cases, no matter how one comes down on the death penalty debate, can inform people a little bit about the lasting ramifications of the death penalty, at least in these particular trials.

Now, I was in Desert Storm. I was in Iraq in 2003. If someone had told me then that one day I would be in favor of General Order No. 1—no cold beers—I would have said, "Not me." But in seventy-one of these ninety-six World War II cases, the defendant had consumed some amount of alcohol before he committed the offense. I can't tell you that he was legally intoxicated—we do not know the percentages except in a few cases—but alcohol was a contributing factor. If today you are advising one of your Commanders and he is considering maybe not having the ban on alcohol, feel free to say, "Fine, sir. 96 executions; a lot of murders; 71 were drunk. But just let me know, and I will do whatever you want."

The files on these execution cases rested with the Army for almost seventy years; approximately two years ago the National Archive system gained them, and they are currently in St. Louis. They are in a place called "the Vault." It has a massive door and massive walls, and is fireproof because, as you know, back in 1973 the Archives out there had a horrible fire and a lot of these records were burned up.

In my initial hunt for the records out at the Archives, they told me that most of them burned up; I could not get to them. But as I found out, at least ninety-three are still in existence. I think more of these records survived out there, and you may have to stay at it to get at these records.

It has been a long and winding road from the beginning of this project to *The Fifth Field*. On September 11, 2001, I was a professor at the National War College. I figured sooner or later the United States was going to catch some of these terrorists and, like many, I wondered what we were going to do with them. I thought I should go over to see the Judge Advocate General, because the government might start military tribunals any week now. I spoke with my students about the pros and cons of military tribunals from a Soldier's perspective, not from a legal one.

While I was visiting the Army's Clerk of Court's Office, a nice lady who had probably worked there thirty-five or forty years came up to me and said, "Colonel, do you want to see the death book?" Well, making the decision in about two seconds, "Do I want to go through my whole life never knowing what that was or do I want to see the death book?" She brings out an accountant's ledger. It is green and large. When I open it, in very neat ink handwriting, pre-ballpoint pen, is the information of all of these death penalty cases. I read through them for hours, not having known anything about this part of our history. I knew about Eddie Slovik but I did not know about the other 95.

When I finish with the death book and give it back to her, she says, "Do you want to see the case files?" "Sure, where are they?" She responds, "In the closet." She wheels out the first case file which is thick with papers. It contains trial records and witness statements and pictures and military police reports.

The first case contains a heavy, closed envelope. I reach in and pull out the murder weapon. It is the knife that the Soldier used to stab and

kill a military policeman. And this kid paid for it with his life. Well, now, I have to see all the files!

I copied as many of the files as I could, to get a historical record of each case. I was not looking to overturn cases. I figured if a series of reviews said everything was legal and all the Commanders said everything was legal in a particular case, who am I, as a non-lawyer, to say, "Well, you violated this rule of evidence?" I wouldn't know that. So I'm writing about these Soldiers' histories. And while I do that, I find out that they are buried in one cemetery, that I call the Fifth Field.

This cemetery, the Fifth Field, is also known as Plot E. It is sixty-five miles northeast of Paris, adjacent to a World War I military cemetery, which has four fields: A, B, C, and D. You have visited these cemeteries; you know the crosses marking each grave. The grass is perfect. The crosses are all clean all the time. Past these pristine fields, there is another field. This one is behind a ten to twelve foot wall, and no one can go into without special permission.

The Fifth Field is all based on records and reports and I knew I really needed to get some first-hand testimony or first-hand witnesses. So I put on my website, in a searchable format, the names of about twenty Military Police guards at the various stockades in Europe during World War II, hoping that someone today would be surfing the net, searching for that name.

And sure enough, a lady called me and said, my uncle was the Supply Sergeant at the Loire Disciplinary Training Center and he has stories about the twelve executions there. Back then, the hangman would come into stockade supply room two days prior to the execution, sit down, have a cup of coffee with the Supply Sergeant and then say, "Okay, let's get the rope." They would roll this rope out from a spool until it was the width of the supply room and that's how they would cut it. Not very precise. You know, it wasn't down to the inch, but it was good enough. And then, they would have a roll of black hoods. It was similar to the system at the grocery store where you pull the bag down to put apples in the bag and the bag tears off the spool. It was kind of like that.

I received another call from a fellow down South who said, "My father talked to me about four executions in Italy." The father died in 1992 and the son told me about this and lots of other things. I'm taking

notes on the phone, and I told the fellow that he had a fabulous memory remembering what his father told him twenty-one years ago. He said, "Oh, no. It's not my memory. I'm looking at pictures." What pictures? The Army said there wouldn't be any pictures because it was strictly forbidden to take photos. But the fellow says, "Oh, sure. I have photos of two hangings and two firing squads."

The last time photos emerged of the United States Army executing United States citizens, to my knowledge, is the Lincoln conspirators back up in Washington in 1865. The reason I'm sharing this is that I believe that posting things on the Internet may become a tool for people who are surfing to contact you with possible evidence that you would not have normally. You can run an advertisement on the television or the radio, but that goes in one ear and out the other. You might need to figure out the chain-of-custody for evidence, and so forth, but it might be something that could help you in the future.

As an old professor from the National War College and a graduate of the School of Advanced Military Science out at Fort Leavenworth, I cannot give a briefing without mentioning Carl von Clausewitz.

Clausewitz said that a War for national survival would approach total War and people would do things "outside the box" just to survive. World War II was one of those types of Wars. Americans have had three such Wars: The Revolutionary War, which if we failed, we didn't become a country; The Civil War, which if the Union failed, it became two countries; and World War II, which if we fail and the Germans win, our whole way of life is going to change.

During World War II, over ten million folks were inducted; 400,000 died. Now, remember that then, the country was half the size that it is today, so double the numbers to get the true impact. .It would be the equivalent of 800,000 fatalities. You can imagine what people would think about that. I do not know how Judge Advocates did it. Their jurisdiction was not just in Europe but in the Pacific, the Canal, China, Burma, India, Alaska and the Continental United States. There were 12,000 general courts-martial.

All of those dots are serious crimes. The ones with X's are murders, most of the others are rapes. That's the Normandy Peninsula. Up at the top you see a bunch of them. They go to Cherbourg, that's the largest city. And then over here kind of by the legend, there are the Normandy

beaches. This is just for September. Supplies are coming into Normandy, because the front line now is way over by the exit door. By September, we're at the Siegfried Line, Patton's pushing. He's running out of gas, and we've got all of these supplies coming through, and all of these crimes are being committed against French citizens.

[Generals Omar] Bradley and [Dwight] Eisenhower must be going crazy. A French doctor who examines a rape victim said, "I've seen something like this before, when the Gestapo interrogated somebody." You never want to be compared to the Gestapo! Bradley must be concerned that the French are going to pull rifles from the barn and start shooting at Americans. That would impact operations. It would impact supplies. Clearly a few Soldiers' criminality affects operations; and that is, of course, where Judge Advocates come in.

When I reviewed all ninety-six courts-martial, I found between six and eleven voting members on each panel. I never found one that had more than eleven, and I never found one that had less than six. In order for a panel to convict and sentence to the death penalty, there had to be seventy-five percent and fractions accrued to the defendant. Once an accused entered the sentencing phase, the panel had to vote one hundred percent for death. If one person didn't, then the accused would get life.

All of the jurors had other jobs; they were commanders, staff officers. It was part of their duty to be on a court-martial, but they had things on their minds as well. In my research, I identified 409 jurors and I found out their grades. There were no General Officers on any of these panels. Some may feel that an accused may not want an infantry officer on a panel because he would vote for guilty all the time. I did not find that to be the case. The three largest contributors to panels were: the Corps of Engineers, Infantry, and Quartermaster. Sixteen Judge Advocates sat as voting members on panels, an occurrence which I do not think would happen today. Twenty-two panel members graduated from the United States Military Academy at West Point. Four officers sat on execution panels that ended up executing five guys. Is it easier for them the second time around? If today, in military tribunals, panels used the same members more than once, someone is going to ask that question.

Back then, in the earlier part of the War, the defense counsel was not a lawyer, and that's just the way it was. Sometimes the prosecutor was not a lawyer either. The president was the senior officer. Also a law

member would determine the rules of evidence. If the defense counsel objected to something, then the law member would look it up in the 1928 *Manual for Courts-Martial*.

Now, remember, some of these trials lasted from opening gavel to closing gavel, eighty minutes. So that law member is not going to say, "I'm going to go to the law library to look this up." He is frantically searching, and probably the other guys are saying, "No, no! You need to go to paragraph 3-1. But that contradicts paragraph 4-5! What do we do?" They are making decisions really fast.

I used the term "guys" because in those days there were no female officers who sat on any of these ninety-six court-martial cases. No female defendants were prosecuted in any of these ninety-six cases. That was the way it was. And then, there were no enlisted personnel as part of the jury.

In my study of the ninety-six executions, all were for murder and rape, except for Eddie Slovik. Twenty-six of the victims were military personnel of which four were officers. Some of the victims were in the performance of their duties, like an officer of the day checking a guard out, asking him for his weapon, and the kid shoots him. Some of them involve a guy and his best buddy playing craps. The guy loses all of his money to his buddy. The buddy makes fun of him. He pulls out his M1 Garand, pumps eight rounds into him. So some of them are duty-related, some of them aren't. A lot of them were stupid crimes.

In these cases, Soldiers murdered thirty-five British, French, and Italian civilians. Soldiers raped thirty-six female civilians. There were three types of review back after World War II, none of them involving civilian review. The convening authority's Judge Advocate would offer his opinion on whether everything was legal. It then would go up to the Theater Judge Advocate, a Brigadier General, and he would offer his opinion. Finally, the branch office within each theater would offer an opinion. At this level a three-person board convened to review the case. This board worked for the Judge Advocate General in Washington; it did not report to Eisenhower. So nobody in Eisenhower's chain could pressure the board. Their first headquarters was in downtown London. Their second headquarters was in downtown Paris, three blocks from Harry's New York Bar. It's good duty. Somebody had to do it, but you were not in the Hürtgen Forest.

The theater commander was the confirming authority. In my opinion, it could have been withheld by the president. In one case, the appeal did go to the president and his military aide said, "Sir, you don't want to touch this. Let Eisenhower do it." And the President said words to the effect of, "You're right," and he sent it back. Eisenhower was the confirming authority for every execution in the European theater. Italy was the Mediterranean theater and Eisenhower did not have anything to do with that; that was a different four-star general.

Two of the most well-known convening approving authorities were General [George S.] Patton and General Bradley. If, in the 1940s, there was something that could be considered a rocket docket, it was the 3rd Army under General Patton. From the commission of an offense, assuming law enforcement arrested the accused at about that time or a few hours later, to the time of the court-martial, General Patton's boys could get a case to court in five days: investigation, preferral of charges, all of that stuff. Now, the down side is, I wonder, when did the defense counsel meet the defendant for the first time and how long did the defense counsel have to prepare?

One of the reasons cases moved so quickly was that the tactical front was moving. Sometimes it moved very rapidly and investigators could not wait a month or two to interview civilians. Remember, also, there were 400,000 dead. Witnesses die every day in Europe and if investigators did not get that testimony, it was lost.

When cases reached General Eisenhower for review, his Judge Advocate said, "Look, Boss. Whenever we send one of these up to you, you say, 'but he's so young.' The whole Army is young. That is all you are going to get." There were no sixty-year-old guys in the Army. They were nineteen. They were eighteen. Some of them were younger. All of them were junior enlisted. Today's equivalent today would be an E5 or below. Once a Soldier was condemned, he was reduced from Private to general prisoner.

Of the ninety-six, sixty-one had previous court-martial convictions. Those convictions could be evidence at trial if they were within a year of the court-martial. If the conviction was older than a year, it would not be allowed. Six of the ninety-six were convicted felons. There was a guy there from Sing Sing, a guy there from Menard that was doing twenty for armed robbery; San Quentin had a guy for auto robbery. The Soldier from Sing Sing previously had about five counts of assault with a deadly

weapon, and then in the Army he stabbed somebody. Who would have thought it? How he must have turned when he came in the Army.

Back then, there was no computer system to check these Soldiers. America was a big country; the Army did not know about the Soldiers backgrounds. A young man would tell the personnel specialist, "I want to join the Army. I am from New York City." There was no way to check up on that. But every time a jury condemned a Soldier to death, the Army would request from the Federal Bureau of Investigation (FBI) any records by fingerprint that this guy may have from his civilian life. The jury would never get this information. Eisenhower would get it in Europe only if it reached him in time. Sometimes the FBI was so late that they did not get the prints back until months after the execution.

Of the executions, eighty-nine were by hanging while seven were by firing squad. Thirteen of the hangings and two firing squads were botched. What's a botched firing squad? A botched firing squad is if the person does not die right away. Why am I telling you this? People think from cradle-to-grave that everything with the judicial system really does belong to the attorneys. So if the execution does not go right, lawyers get a black eye even though by the staff division manual it is the Provost Marshall who is responsible.

When United States forces got to Britain, we did not have our own hangman. The British let us use theirs at ten pounds [sterling] a whack. The British conducted seventeen hangings. One executioner conducted about 180 hangings in his career while his young nephew conducted 345. They knew how to do it and they had it down to a science to where the Soldier died immediately when he was hanged. They would weigh and measure the Soldier and calculate the drop.

If a Soldier killed a Frenchman or raped a French woman, the Army would hang the Soldier very close to where the crime was committed so the people in the town could see that they meant business. Could you imagine the uproar today if a Soldier was taken back to Afghanistan for punishment? We would probably hear a little bit about that.

It was not enough for a case to be legally-sufficient; it had to pass the common sense test, too. In Sicily, four Soldiers raped a woman at gunpoint. The Army wanted a joint court-martial. The defense counsel disagreed; they wanted severed trials. So, the Army severed them. At the first trial, the panel finds the Soldier guilty in 80 minutes and gives him

the death penalty. The courtroom is cleared for the next defense counsel and Defendant No. 2. The very same jury comes strolling on in. They sit down. They use the same jury for all four. Now, as I look at it from a historical perspective, I see the length of each trial shortening over time. Maybe the panel was hungry, maybe it was getting close to lunch. I figure they are assimilating all of this, and I do not think that is what is supposed to happen. That's not what any of you signed up to do.

Down in North Africa and Sicily, the delegation of the onerous execution duty got passed down from the senior officers to the junior officers, usually Majors. Eisenhower did not like that, so he calls in his Provost Marshall, a Brigadier General, and says, "You're hanging him. No delegation. You put the rope; you pull the lever." Eisenhower tells the theater Judge Advocate, "You're watching." He tells the investigating officer, "You're watching." He tells the president of all four panels, "You're watching. If you are going to sentence these Soldiers to death, you have got to be big enough to watch them hang." So all of these senior Generals and Colonels go and watch the four Sicily guys get hanged.

With regard to clemency, sometimes a panel would declare guilt and adjudge the death penalty and then immediately sign a statement to Eisenhower requesting clemency to reduce the sentence to one of life imprisonment. Well, wait a minute, if only one panel member needed to disagree with the death sentence for it to be life, why did they sentence that way? It is bad enough when the defense counsel sends the letter but it is really bad when the jurors sign on.

Eisenhower could see that the Army was going to integrate after the War. He put out an order that said, in death penalty cases and other serious courts-martial that could inflame racial sensibilities, at least one panel member would be of the same race as the defendant. Now, of the lawyers I have talked to, some say this was good; some say that he should not have tinkered with the panel. The problem with this order was that he put it out secretly.

The first wave of commanders heard it; but when they transferred, there was nothing in writing, and so subsequent commanders may not have followed through. If Eisenhower was going to do it, the secret part really hurt. Eisenhower received a Judge Advocate colonel on the European Theater of Operations staff and he used him as a direct telescope into many death penalty cases. He told the Judge Advocate to

look at every death penalty case and tell him if something did not seem right. I believe Eisenhower used that attorney to overturn some death penalty sentences because that Judge Advocate could come in with no fear of retribution and say, "Sir, this didn't smell too good on this one."

What would get a Soldier life imprisonment? Well I asked myself how I would have voted in a separate chapter in the book; this is just my view. When the 'shrinks' came back and said that the Soldier had the mental capacity of a six-year-old—I'm not hanging him. I can't do that. Or when the military police arrest a Soldier for being boisterous in a bar and they use racially-sensitive language and the Soldier, just a kid really, pulls out a pistol and kills one, I am not hanging him either. Now, he killed them, but there was a contributing factor that would stop me from giving the death penalty. So when Eisenhower said, "Don't do the trial," unless you have a racially-mixed jury, then you don't go do that. Historical records support that many panels knew of this order but went ahead to trial anyway. That secret order should have been promulgated openly.

Often, only after the execution did families get notified by telegram saying, for example, that their son died in Paris, France, August 31, 1944, due to his own misconduct of judicial asphyxiation. Families might not have understood what this meant until they brought that letter to the old local justice of the peace. The families did not get insurance because the death was due to the Soldiers' own misconduct. The Soldiers were buried in France. This is, in a way, their second punishment. In my opinion, punishment stops at death. I think these Soldiers ought to have some kind of marker that has their names on it.

As I reviewed the casualty notifications, I found in one file a letter from an old man who was looking for his father's grave.. He did not know what happened to his father in World War II. From the file, it was clear that the Army had given all the information to this man's congressman, and the congressman had chosen not to give it to him. Well, I called him up. The man said, "Sir, I have been trying to find out my whole life what happened to my dad. Nobody will tell me." I sent him the pictures of his father's grave. He called me back crying. He said, "Nobody would ever help me; nobody told me. Why wouldn't they tell me where he was buried? Now I know where he's buried, now I can rest." I hung up the phone. He called me up about an hour later and said, "Do you know how my dad died?" I told him that I would not tell him over the telephone but that I would come down to Memphis and tell

him man-to-man. He called me back the next day and told me that he didn't want to know. There is just something not right about kids not knowing where their parents are buried even if the parent did something really bad. As long as the secret cemetery operates the way it does, and until this story sees the light of day, then a lot of people won't know that.

THINKING, FAST AND SLOW[1]

REVIEWED BY MAJOR STEVEN P. VARGO[*]

"How many animals of each kind did Moses take into the ark?"[2]

I. Introduction

The question is flawed, and if you started computing a number without recognizing the mistake, you need not be ashamed—you are in the majority.[3] The association between "Moses" and "ark," though biblical, is out of context. Noah, not Moses, belongs in the question.

The author of *Thinking, Fast and Slow (Thinking)*, Daniel Kahneman, helps the reader understand how the mind works by drawing from recent developments in cognitive and social psychology. He elucidates the relationship between "fast" (automatic) thinking and "slow" (effortful) thinking. He explains that "fast" thinking (a product of what he calls System 1) is the hero of the story but also the source of most thinking errors. Unfortunately, "slow" thinking (a product of what he calls System 2), mistakenly believes it is the source of most thought—the real hero—leading it to persistently neglect its job of correcting the errors of "fast" thinking by unwittingly accepting these errors as its own trustworthy productions. The Moses/ark question is an example of a lazy System 2 failing to check the coherence automatically detected by System 1. In other words, System 2 does not realize System 1 is Batman, and its role is that of the dutiful and capable Robin (albeit with a very sophisticated tool belt).

After roughly a half-century of work as a cognitive psychologist, Mr. Kahneman is uniquely qualified to write on the human thought process. *Thinking* is a scholar's offering of a thinking book for the general public. Though at times tedious due to the introduction of unfamiliar

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[1] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[2] *Id.* at 73.

[3] "The number of people who detect what is wrong with this question is so small that it has been dubbed the 'Moses Illusion.'" *Id.*

terminology and presentation of numerous scientific studies, a reader that makes it to the end of the book will be rewarded with a better understanding of the human mind and a keener ability to identify mistakes in thinking that lead to mistakes in decision-making.

II. About the Author

Mr. Kahneman is the 2002 recipient of the Nobel Prize in Economic Sciences "for having integrated insights from psychological research into economic science, especially concerning human judgment and decision-making under uncertainty."[4] The Nobel Prize is one of a long list of awards that also includes a Lifetime Contribution Award from the American Psychological Association (2007) and the Presidential Medal of Freedom (2013).[5] Mr. Kahneman spent some of his early years as a psychologist with the Israeli Defense Forces where he utilized his expertise to improve the training of Air Force pilots and develop a system to more accurately predict candidates likely to excel in officer training.[6] He received his Ph.D. from the University of California at Berkeley in 1961. Since that time, he has been a fellow, visiting scientist, and professor at numerous universities, most recently as the Eugene Higgins Professor of Psychology Emeritus at Princeton University and Professor of Psychology and Public Affairs at Princeton's Woodrow Wilson School of Public and International Affairs.[7] Mr. Kahneman has authored seven books, and his work in the field of psychology has been published in numerous journals, including *Science* and *American Psychologist*.[8]

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[4] *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2002*, NOBELPRIZE.ORG, http://www.nobelprize.org/nobel_prizes/economic- sciences/laureates/2002/ (last visited Sept. 9, 2013).

[5] WOODROW WILSON SCH. OF PUB. & INT'L AFF., *Biography of Daniel Kahneman*, http://www.princeton.edu/~kahneman/biography.html (last visited Sept. 9, 2013).

[6] KAHNEMAN, *supra* note 1, at 175–76, 188–89.

[7] WOODROW WILSON SCH. PUB. & INT'L AFF., *Curriculum Vitae of Daniel Kahneman*, http://www.princeton.edu/~kahneman/docs/DKahnemanCV.pdf (last visited Sept. 9, 2013).

[8] *Id.*

III. Organization

Thinking is comprised of four-hundred and ninety-nine pages, including an introduction, thirty-eight chapters, a conclusion, an appendix with two of the author's most well-known, peer-reviewed articles, roughly thirty pages of notes supplementing the material presented in the chapters, acknowledgments, and an index for quick reference of key terms and subjects. The thirty-eight chapters focus on three main topics: (1) the human mind as viewed through the intuitive System 1 and the effortful System 2, with particular emphasis on the impact that each system's weaknesses have on decision-making; (2) the application and limitation of theory (e.g., the rational-agent model) to define humans who live and act in a real world; and, (3) the two parts of each person, the part that does the living (called the "experiencing self") and the part that makes decisions and evaluates life (called the "remembering self"). To assist the reader, Mr. Kahneman ends each chapter with several concise statements that sum up the premise of the chapter.[9] The table of contents and index permit use of *Thinking* as a reference book; however, each chapter presents concepts for later application and reflection, and when read sequentially, provide a better understanding of Mr. Kahneman's overall impression of the human thought process and support for his concluding discussion on libertarian paternalism.

IV. Strengths

A. Universality

In his introduction, Mr. Kahneman stated his aim was to inform "watercooler conversations" by helping the reader "improve the ability to identify and understand errors of judgment and choice . . . by providing a richer and more precise language to discuss them."[10] Mr. Kahneman accomplished this task by identifying and assigning labels to the most common thinking errors, such as the aforementioned lazy mind's readiness to accept the "associative coherence" between "Moses" and

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[9] For example, in summarizing a chapter about thinking errors related to "rare events," he states: "Tsunamis are very rare even in Japan, but the image is so vivid and compelling that tourists are bound to overestimate their probability." KAHNEMAN, *supra* note 1, at 333.

[10] *Id*. at 4.

"ark" without question. Most importantly, *Thinking* is relevant regardless of the reader's occupation—whether their water cooler is between cubicles, on the back of a truck bed, or a military water buffalo. The book does not have a single target audience.

B. Language

Mr. Kahneman introduces an unfamiliar language to describe thinking in a style of writing that is clear, and at times, humorous. A reader might fault Mr. Kahneman at the outset for his use of two fictitious systems—System 1 (fast, intuitive thinking) and System 2 (slow, effortful thinking). Arguably, these fictions are too simplistic an explanation for the human mind. Even a non-scientist reader understands that the brain and the human thought process are complex and not fully understood. As a result, dividing thinking into two systems seems an error of oversimplification.

Yet, the fictions work. They serve the important purpose of facilitating a discussion between the author-scientist, Mr. Kahneman, and the reader. Mr. Kahneman is upfront about the fiction of the systems, but when he writes System 1 is at work, the reader readily understands the author is referring to a quick, intuitive thought process, not solving a math problem with pencil and paper (that would be System 2).[11] The systems comport with data Mr. Kahneman has collected over decades of study and bridge a gap between the scholar and the lay reader. Moreover, it is the interaction between "fast" and "slow" thinking—much of which occurs unnoticed by the thinker—that is the source of many poor decisions. As a result, naming these broad thought functions and assigning them into systems helps quickly focus the reader on what might otherwise be unmanageable, slippery concepts.

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[11] Perhaps a better explanation of the systems is as follows: "'System 1 does X' is a shortcut for 'X occurs automatically.' And 'System 2 is mobilized to do Y' is a shortcut for 'arousal increases, pupils dilate, attention is focused, and activity Y is performed.'" *Id*. at 415. Consider that one need not ponder thoughtfully that there is a man with an angry face twenty paces down the alley but automatically notices something is wrong and responds accordingly. Such an automatic thought is a product of System 1. Quick thinking is, at times, a necessity and advantage, though not always accurate. Life in a state where every thought required a sweaty brow (System 2) would be excruciating and render us in a constant predicament of mental exhaustion. *Id*. at 11.

C. Practical Pertinence

Imagine a water cooler at a typical corporate office on Monday morning where five human resource workers gather for a drink. Worker A is worried about the company's stock, which recently lost several dollars per share and negatively impacted his retirement savings. Worker B could not sleep last night as he mulled over the list price of a home he is considering purchasing for his growing family. Worker C returned Sunday from a vacation to the beach and claimed his entire trip was ruined by a traffic jam on the ride home. Worker D initiated a debate that proposed golfer Phil Mickelson choked and wasted his time as a television viewer by failing to shatter the low round 60 record after making seven birdies on the front nine of a recent tournament. Worker E is giddy after being assigned to lead a new business project that is expected to turn the tide of the company's loss of market share for the past decade.

One of the greatest strengths of *Thinking* is the practical advice it provides the reader from a renowned psychologist for common situations. For instance, imagine Worker A intends to make a stock sale as soon as the market opens. Despite his company's downward trajectory, he decides to hold on to its stock, which is worth much less today than when he purchased it a year ago. Instead, he decides to sell the stock of a well-run natural gas company that will net him a considerable gain when sold today. Mr. Kahneman would explain to Worker A the principle of "loss aversion." There is something intuitive in the human response to loss. Loss hurts, especially to System 1. It hurts so much that the mind computes the pain of a loss as worse than the joy of a gain. A stock trader must guard against this intuitive aversion, which compels him to sell the winner and keep the loser. Upon reflection and research (slow System 2 thinking), it may prove more financially prudent to hold the winner (which is likely to keep gaining) and sell the loser (taking the immediate pain of the loss).

Mr. Kahneman would warn Worker B of "anchoring." The list price of the home presents an anchor price that will frame Worker B's belief about the value of the home. System 1 has been primed by the list price and will seek to make it understandable. Mr. Kahneman illustrates the problem of anchoring with the following illustration:

> Was Gandhi more or less than 144 years old when he died?
> How old was Gandhi when he died?[12]

An age of 144 is too old and quickly discounted; however, studies have demonstrated that initiating with a high number resulted in much greater estimates compared to a question that inserted a lower number, such as "35" for "144." Even licensed, experienced real estate agents that asserted they were impacted only by the actual property, not the anchoring list price, were shown during a study to be just as susceptible to anchoring in home prices. As a result, Worker B must be careful not to put too much trust in the list price or deceive himself into believing he has been successful at discounting it.

Mr. Kahneman would advise Worker C to focus more on all the experiences of his vacation (including swimming in the ocean, playing Frisbee, going out to eat), not just the worst memory of the trip (the drive home). He explains the human tendency to think in terms of the "remembering self" rather than the "experiencing self." As such, a man who listens with joy to a relaxing record for one hour that suddenly ends in a screeching halt is not, in one sense, wrong in saying the entire experience was ruined for him. His remembering self focuses on the terrible ending; however, if he thought more deeply about the actual experience of listening to the music during the hour, he would realize the experience was not as bad as his remembering self would lead him to believe.

Worker D would receive a lesson from Mr. Kahneman on "regression to the mean." Phil Mickelson is a great golfer, especially when compared to the average weekend golfer. Yet, Phil has an average like every other golfer. Applying the cold, hard math would suggest to Worker D that Phil, despite his fabulous front nine at the tournament, would likely not keep the same pace on the back nine. Things that regress far from the mean, even the scores of great golfers, are likely to come back to the mean sooner than later.[13]

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[12] *Id*. at 122.

[13] Regression to the mean is also the reason Mr. Kahneman told instructors at the Israeli Air Force that screaming at a pilot for a bad maneuver should not be assumed to be the cause of improved performance on the next maneuver. Regression to the mean instructs that a pilot's really bad maneuver will likely get better just as another pilot's really good maneuver will likely get worse. *Id*. at 175.

Mr. Kahneman would tell Worker E to apply an "outside view" to the proposed groundbreaking project. A problem often associated with significant projects—think of the recently built San Francisco-Oakland Bay Bridge's new span—is that those on the inside tend to make estimates based on the best case scenario from evidence immediately available, which is profoundly influenced by their own experience and bias as a member of the team of insiders. Mr. Kahneman, as learned as he is, explained his own irrational perseverance in a curriculum project. After a year of work on a committee dedicated to designing a curriculum and textbook to teach judgment and decision-making for the Israeli Ministry of Education, the author stopped to ask the expert on his team about "other teams similar to ours that had developed a curriculum from scratch."[14] The time estimate gleaned from similar projects was seven to ten years with a 40% failure rate. Nobody on the team was willing to dedicate seven to ten years on the project, but work continued despite the evidence (which included an honest assessment that their skills were below average compared to the other groups that took seven to ten years). Ultimately, they did not accept the outside view and the reality it presented. The textbook took eight years to complete and was never used.

One of the greatest strengths of *Thinking* and strongest credits the reviewer can give to Mr. Kahneman is the honest assessment that it is a painstaking task to compile a "short" list of his book's strengths. The brief illustrations provided above are an extremely small sample of a treasure of thought-provoking insights. Mr. Kahneman has earned the position of expert through rigorous scientific study over many decades. A reader will appreciate his desire to inform our understanding of the human thought process and his effort to march our knowledge about thinking a step forward.

V. Weaknesses

Given the breadth of the author's credentials in the area of cognitive psychology, this portion of the review treads on shaky ground. These weaknesses are presented from the standpoint of a lay reader, and despite my critique, I remain thankful to the author because I have benefited from putting several of the lessons learned from *Thinking* into practice. From my own water cooler, I offer a thought that is hard to articulate but

[14] *Id*. at 245–47.

persistently nagging. Despite the book's exceptional quality, I was often unable to connect deeply with the content. This is bizarre, considering I should connect to "thinking." Yet, I felt something was missing.

Though I understood and appreciated Mr. Kahneman's commitment to presenting reliable data throughout the book, understanding human thought primarily from a laboratory and carefully devised situations became antiseptic after several hundred pages and seemed sterilized from reality. He touched upon the humanity of thinking in a more personal sense when he wrote of the "Two Selves" in Part V of the book, and I would have enjoyed reading more about what, to me, seemed to be one of the most interesting portions (though the shortest) of his book. As I read through the roughly five-hundred pages, I longed to discover something that would interest and speak more deeply to me. When I saw a chapter on "Bad Events" I became excited, only to find it ultimately unsatisfying.

For instance, applying the principle of "loss aversion" in the chapter on "Bad Events," though understandable, seemed to miss, in a deeper (dare I say "human") sense the point. Mr. Kahneman spent most of the chapter discussing examples of bad events as putting for birdie instead of par, collecting cab fares in New York City on a rainy day, or a reduction in wages.[15] Though these examples provided coherent vehicles to explain the bottom line concept (especially in relation to economics), the author missed a chance to connect with the reader and share his expertise where it might be needed the most. In life, where people struggle with addiction, terminal illness, death of loved ones, abuse, etc., the examples presented in the chapter seemed mere counterfeits of the real thing. *Thinking* is understandably much different from a fine novel or play; the author is a scientist, and a reader should not expect a good scientist to take some data and become an opinionated prognosticator in areas far afield.

Yet, I wanted more from the author in this forum. When he spoke of his belated research partner, Amos Tversky, I could sense his passion. So much of the book, however, was dedicated to constructing a framework of the human thought process and economics that the conversation I would long to have with Mr. Kahneman if I ever had the

[15] *Id*. at 300–10.

pleasure to make his acquaintance began too late in the book.[16] Portions of the book that spoke of resilience after suffering from paraplegia or the devastating impact of depression were quite interesting, but given short treatment.[17] Where we are hurting the most is where we can, and need, to be helped the most, especially the non-scientist lay public who is the intended audience. In the end, I felt constrained by the water cooler setting with its interesting but often superficial discussions.

Understanding the comparison is terribly imperfect, I make it nonetheless to illustrate what I struggled with as I read over portions of *Thinking*: imagine if the marrow of Shakespeare's stories addressed a bad day of golf or a wet taxi fare. Mr. Kahneman is so knowledgeable a scholar and so strong a writer that I wanted to venture deeper into the brain with him, deeper into his thoughts, deeper into life. Considering this review began with Moses, I might ponder with him how a man's experiencing self can be cast into the river, thrown out of the palace, made to wander the wilderness for forty years, only to see but never enter the Promised Land and still be a life that generates so much awe and gives so much hope. Is it truly just a faulty remembering self with duration neglect, the human love for a story? Or, might we by word venture still deeper with Mr. Kahneman into the places where life gets most interesting. Perhaps the biggest trouble for a man with thoughts as illuminating as Mr. Kahneman is the appetite he creates in his readers for more than can be dished up on already scrumptious plate. It's hardly his own fault that he is so good a chef of word and thought—but the human appetite for knowledge is voracious and everyone wants desert. Regardless of any weakness, *Thinking* fostered within this reader a lingering, and appreciated admonishment: that the business of thinking and the pursuit of writing lucidly upon it is no simple matter and one that deserves much attention.

VI. Conclusion

Mr. Kahneman should be commended for *Thinking*. His dedication to scientific thought for almost a half-century has resulted in a text that can enlighten the reader with simple though often hidden truths to the human

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[16] For example, is it System 1 or System 2 that a victim advocate should explain to a rape victim that is overwhelmed with grief and fear? Do the systems have much to say here or do they explode?

[17] *Id.* at 245–47.

mind. Through study and dedication, he has helped us better understand that puzzling grey matter between our ears and produced for all of us a work of exceptional value.

THE FIFTH FIELD: THE STORY OF THE 96 AMERICAN SOLDIERS SENTENCED TO DEATH AND EXECUTED IN EUROPE AND NORTH AFRICA IN WORLD WAR II[1]

REVIEWED BY FRED L. BORCH III[*]

Between March 1943 and October 1945, the Army hanged (or shot by firing squad) ninety-six soldiers who had been tried by courts-martial and condemned to death. *The Fifth Field* is about those trials—who, what, why, when, where and how—and will be of great interest to all judge advocates because no other book has previously analyzed, much less examined, the records of trial in death penalty courts-martial conducted during World War II.

Author French L. MacLean, who delivered the George S. Prugh Lecture in Military Legal History on this topic in April 2013, deserves special praise for researching and writing this unique study in military legal history. As a retired Infantry colonel with first-hand experience with courts-martial (MacLean served as a panel member in more than a few cases), the author also has an insider's view of the military criminal legal system that gives him additional credibility when discussing whether justice was done by these military tribunals.

The Fifth Field begins with a short statistical analysis of the Army's use of the death penalty in World War II[2] before continuing with a longer discussion of how the military judicial system operated "in the field" between 1942 and 1945. The book then examines each of the ninety-six

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Fred Borch is the author of a number of books and articles on legal and non-legal topics, including *Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to Haiti (*2001*)*, and *Judge Advocates in Vietnam: Army Lawyers in Southeast Asia (*2004*)*. His latest book, *Medals for Soldiers and Airmen: Awards and Decorations of the United States Army and Air Force* was published by McFarland Press in 2013.

[1] FRENCH L. MACLEAN, THE FIFTH FIELD (2013).

[2] *Id.* 20–22.

cases in which the accused was executed; most were hanged but a few (like Private (PVT) Mansfield Spinks[3] and PVT Eddie Slovik[4]) were shot by firing squad. Each court-martial is covered in a two- or three-page synopsis, with relevant information about the accused and the circumstances surrounding the charged offenses. Colonel MacLean also includes data about the officers who served as jurors on the court-martial panels, and usually provides considerable detail about how the executions were carried out.[5] *The Fifth Field* then takes a "closer look"[6] at eight cases in order to highlight evidentiary issues (usually mistakes made by defense counsel) that might have affected the verdict. In a subsequent chapter, MacLean also explains how he would have decided each case, based on his experiences with courts-martial during his career as a professional soldier. *The Fifth Field* concludes with a folio of photographs of some accuseds and victims that apparently have never been published previously.[7] All this makes for riveting—and sobering—reading.

As *The Fifth Field* shows, the more things change, the more they stay the same. Then, as is common now, the most egregious criminal cases involved soldiers who were drunk or otherwise had used alcohol to excess; those who have served as trial and defense counsel in the Corps today can attest that today's cases are no different.[8] The court-martial of Private Amos Agee, Private John C. Smith, and Private Frank Watson, all assigned to the 644th Quartermaster Troop Transport Company, is a perfect example. The men arrived in France on 30 August 1944. Less than four days later, "in what may have been an ignominious record for new soldiers in the theater,"[9] Watson robbed two French civilians and all

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[3] Private Mansfield Spinks was convicted of rape and murder. Sentenced "to death by musketry," Spinks was shot by firing squad on 19 October 1945, many months after the fighting in Europe had ended. *Id.* at 237–39.

[4] Private Eddie Slovik is the only soldier to be executed for desertion in World War II. He was shot by firing squad on January 31, 1945. *Id*. at 129–33. *See also* Fred L. Borch, *Shot by Firing Squad: The Trial and Execution of Private Eddie Slovak*, ARMY LAW., May 2010, at 1–3.

[5] *See, e.g.*, MACLEAN, *supra* note 1, at 32–33 (Private David Cobb), 36–37 (Private Harold A. Smith).

[6] *Id.* at 243–51.

[7] *Id.* at 353–68.

[8] *See, e.g.*, United States v. Green, No. 5: 06CR-19-R, 2009 U.S. Dist. (W.D. Ky. Sept. 4, 2009) (alcohol-fueled rape of Iraqi girl and murder of her family by soldiers from 502d Parachute Infantry Regiment, 101st Airborne Division). For more on the event, see JIM FREDERICK, BLACK HEARTS: ONE PLATOON'S DESCENT INTO MADNESS IN IRAQ'S TRIANGLE OF DEATH (2010).

[9] MACLEAN, *supra* note 1, at 147.

three soldiers raped a French woman. At the time, all three men were highly intoxicated. But alcohol was freely available for sale in liberated France—in bars, cafes, hotels—and there was no prohibition on consuming French wine and spirits.

When Private Agee took the stand, he claimed to have been "so drunk" that he could not remember anything.[10] Private Smith "told the same story," but denied having raped the victim.[11] As for Private Watson, he stated he was "pretty high" but "did not recall visiting the victim's home."[12] The problem for all three soldiers was that the victim testified that the Americans, "armed with a rifle, took turns holding her down and raping her."[13] After her husband corroborated her testimony, the result was a foregone conclusion. All three accuseds were found guilty of rape; Watson also was found guilty of robbery. They were sentenced to be hanged. After their records were reviewed by the Office of The Judge Advocate General, European Theater of Operations, General Dwight D. Eisenhower signed the order directing that the execution be carried out and the convicted men were hanged on 3 March 1945.[14]

The facts in *United States v. Agee, Smith and Watson* (the men were tried jointly) were not unique, in that other soldiers who committed rape (usually under the influence of alcohol)[15] also were sentenced to death. But this was a different time, a different place, and a very different Army. Few questioned the appropriateness of the death sentence for rape; it was still a permissible punishment in many, if not most, civilian jurisdictions.[16] Additionally, no one thought that an alcohol-free Army could be a solution to soldier misconduct; it was not until *Operation*

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[10] *Id.*
[11] *Id.* at 148.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *See, e.g.*, Corporal Ernest Lee Clark & Private Augustine M. Guerra, at 111–13 (accuseds intoxicated when they raped and murdered fifteen-year old girl); Private Mervin Holden and Private Elwood J. Spencer, at 126–28 (accuseds "had been drinking and were looking for a whorehouse" when they assaulted, sodomized and raped 51-year old Belgian female).
[16] For a historical examination of the death penalty in the United States, see Furman v. Georgia, 408 U.S. 238 (1972).

Desert Shield in 1990 that the Army first adopted a blanket prohibition on the consumption of alcohol during military operations.[17]

While the story of each individual court-martial is valuable by itself, what makes *The Fifth Field* an important addition to military history is that the author articulates the purpose of military criminal law in a combat environment and explains how commanders believed it played an important role in winning the war in North Africa and Europe.

Having full and fair proceedings, reaching a just verdict and determining appropriate sentences were certainly key components in courts-martial in North Africa and Europe in World War II. However, other factors were important in the military justice system too. For example, only the most serious crimes were prosecuted, since the Army desired to keep as many soldiers as possible in the war effort and Army leaders did not want incarceration to become an attractive alternative to combat.[18] No one knew for certain if a soldier would commit a minor offense if the result would be a few months in jail away from the horrors of close combat with the Wehrmacht, but the Army did not want to take any chances and so courts-martial were reserved for only the most egregious offenses.[19]

Another factor in play in Europe and North Africa—and one that set the military criminal legal system apart from its civilian counterparts in World War II—was that punishment had to be swift and certain. Units were constantly on the move, and it was highly likely that a delayed trial might mean that witnesses to a crime would be killed or wounded in combat or otherwise become unavailable.[20]

Finally, in courts-martial involving civilian victims in newly liberated areas, Army leaders were only too aware that crimes committed by soldiers might seriously harm mission success, if not adversely affect victory itself. In *United States v. Whitfield*, for example, the accused was convicted of raping a young woman in France—only days after the landings in Normandy.[21] He was sentenced to hang for his crime. Private Clarence Whitfield had been tried by a First Army court-martial, and this

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[17] Headquarters, U.S. Cent. Command, Gen. Orders No. 1, (30 Aug. 1990) (Prohibited Activities for U.S. Personnel Serving in the USCENTCOM A[rea] O[f] R[esponsibility]).
[18] MACLEAN, *supra* note 1, at 23.
[19] *Id.*
[20] *Id.*
[21] *Id.* at 67–69.

explains why Lieutenant General Omar Bradley, then commanding First Army, approved the trial results and forwarded the record for final review to General Dwight D. Eisenhower.[22]

Only Eisenhower had the authority to order Whitfield's hanging to be carried out and, when Eisenhower suggested that perhaps "the ends of justice" would be served if Whitfield's death sentence were changed to life imprisonment, Bradley was furious.[23] As the correspondence contained in *United States v. Whitfield* shows, Bradley insisted that the accused must be put to death.[24] As he put it in a "scorching reply" to Eisenhower, the number of rape cases in the First Army area of operations was causing "considerable difficulty" in its relations with local civilians.[25] Said Bradley: "One way to discourage future cases is to make those convicted of this crime [rape] pay the extreme penalty."[26] As he saw it from his position as First Army commander, the invading American forces must show that they were willing to carry out a death sentence to deter other soldiers from committing similar offenses.[27] Only imposing the 'extreme penalty' would convince the French that they had nothing to fear from their liberators—and that they had not traded one set of evil occupiers for another.[28]

Bradley got his way; Whitfield was hanged. Over time, Eisenhower also seems to have come around to Bradley's viewpoint. Some months later, when Major General Bedell Smith told his boss that French and Dutch civilians were complaining about murders and rapes committed by U.S. soldiers against them, Eisenhower suggested that "there should be a public hanging, particularly in the case of rape."[29]

The Fifth Field is not a perfect book. But a "perfect" book on the military death penalty in World War II would be at least four volumes—one per major war theater and one overall—and most likely require a team of historians and investigators to complete. The theater-specific volumes would go into much greater detail on the evidence used in each case, while the overall volume would provide a more comprehensive

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[22] *Id.* at 67.
[23] *Id.* at 68.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 68.
[27] *Id.*
[28] *Id.*
[29] *Id.* 23.

analysis of the death penalty, including: why some soldiers were sentenced to death for committing homicide or rape while others convicted of the same offenses were not; whether African-American soldiers sentenced to death received fair trials; and whether the use of the death penalty in the Asiatic-Pacific Theater differed from its imposition in North Africa and Europe.

The Fifth Field is not, however, intended to be a perfect book, much less a comprehensive study of military capital punishment in World War II. On the contrary, the value of MacLean's research—which took over ten years to complete[30]—is that it provides a "Rosetta Stone" for every individual interested in Army courts-martial in World War II. All future research on this topic will lean heavily on this work, and the book's 62 pages of detailed footnotes will help judge advocates for years to come to plough their own ground, be that the study of an individual court-martial or the military death penalty writ large.

While no soldier has been executed by the Army since 1961 (when President John F. Kennedy ordered a death sentence carried out for a soldier who had been convicted of raping and attempting to murder an Austrian girl), the death penalty cases discussed in *The Fifth Field* contain lessons for today's judge advocate. Probably the most important teaching point is that Army leaders in World War II—as in Afghanistan and Iraq—understood that serious misconduct committed by soldiers had a pernicious impact on mission success where the victims of that misconduct were civilians. A second lesson is that over consumption of alcohol—then and now—inexorably led to trouble. Many of the rapes and murders of English and French civilians were committed by drunken soldiers who likely would not have committed these crimes had they been sober. Judge advocates prosecuting and defending those soldiers accused of sexual assault likewise usually find that it is excess alcohol that fueled (or at least exacerbated) the accused's misconduct. A final lesson is that, despite the absence of the procedural safeguards provided by today's Uniform Code of Military Justice (UCMJ), the courts-martial examined in Colonel MacLean's book—conducted under the Articles of War—seem to have been full and fair trials. This is an important point, because some judge advocates might be inclined to criticize—or dismiss—courts-martial of the World War II era as deficient because they were *different* from trials conducted today. *The Fifth Field* shows, however, that despite the severity of the sentences imposed, justice

[30] *Id.* at 14.

seems to have been done in the vast majority of the 96 trials. This suggests that the military criminal legal system of the World War II era, while arguably more focused on discipline than today's UCMJ, nonetheless was also about doing justice.

The Fifth Field deserves to reach the widest audience among judge advocates and those with an interest in World War II and military legal history.

BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT[1]

REVIEWED BY LIEUTENANT COMMANDER DYLAN T. BURCH[*]

Traditional approaches to ethics, and the traditional training methods that have accompanied such approaches, lack an understanding of the unintentional yet predictable cognitive patterns that result in unethical behavior. By contrast, our research on bounded ethicality focuses on the psychological processes that lead even good people to engage in ethically questionable behavior that contradicts their own preferred ethics.[2]

I. Introduction

Blind Spots: Why We Fail to Do What's Right and What to Do About It is a well-reasoned and logically argued proposal for the application of scientific research from the field of behavioral ethics to the process of ethical decision-making. The book argues that behavioral ethics—the study of the way that people behave when faced with ethical dilemmas—is the most appropriate lens through which to appreciate and influence the psychological tendencies of otherwise well-intentioned people. To make this case, the authors, Bazerman and Tenbrunsel, successfully contrast scientific research with examples of readily identifiable ethical missteps to highlight the biases that often lead to unethical behavior.

Much to the benefit of the reader, this book is not an ethics primer and it does not advocate a particular set of ethical standards. Instead, this book provides useful analytical tools and practical advice regarding the ethical decision-making process. Military leaders and judge advocates seeking to improve the quality of their advice to military commanders are well served by both the aim and the import of the authors' efforts.

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[1] MAX H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT (2011).

[2] *Id.* at 5.

II. Why Behavioral Ethics?

Blind Spots is premised on a very simple observation: well-intentioned people unintentionally make bad ethical decisions. In other words, people who believe they know what the ethical choice is, and believe they will make that choice if faced with an ethical dilemma, often act counter to their beliefs.[3] The authors argue that traditional models for ethical decision-making do not account for this phenomenon because under such models, it is presumed that people respond to ethical dilemmas knowingly and intentionally.[4] Alternatively, the authors argue that research in the field of behavioral ethics—and specifically the theory of *bounded ethicality*[5]—acknowledges that people do not always recognize an ethical dilemma when faced with one and often respond to ethical dilemmas in ways that are inconsistent with their actual beliefs.

Armed with this premise, the authors work to highlight the cognitive patterns and biases that result in the "gaps" or "blind spots" in a person's ethical decision-making process. Having exposed and analyzed these biases, the authors conclude that anticipating and addressing these biases will result in an ethical decision-making process that favors results most closely aligned with a person's ethical intentions.[6] The authors are refreshingly clear about their purpose, and do not veil their effort to convince the reader that the application of behavioral ethics principles are key to any successful ethical decision-making process.[7] The reader appreciates the sophistication of this approach when the authors successfully apply their findings not only to individuals, but also to organizations and society at large. It is this ready application of their theory to the gamut of human relations that underpins the book's overarching success.

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[3] *Id*. at 4.

[4] *Id.* at 29; *see also* MARK D. WHITE, KANTIAN ETHICS AND ECONOMICS: AUTONOMY, DIGNITY, AND CHARACTER 19 (2011) (Kantian ethics dictate that personal autonomy allows people to make choices "without undue influence from either external pressures or internal desires.").

[5] BAZERMAN & TENBRUNSEL, *supra* note 1, at 7 (emphasis added).

[6] *Id*. at 170.

[7] *Id.* at 22.

III. The Centrality of Bounded Ethicality

Of central importance to the book is the authors' proposition that people's ethical decision-making processes are bounded by many factors because "our ethical judgments are based on factors outside our awareness."[8] They refer to this theory as *bounded ethicality* and present their research with the aim of corroborating this thesis.[9] The authors demonstrate through relevant research studies and historical examples that our ethical decisions are influenced by unrecognized factors. These factors limit our ethical decision-making process by providing incomplete information. Thus, the avoidance of unintended ethical behavior requires the incorporation of additional principles and precautions. The authors explore the effects of ordinary prejudice, egocentrism, and the tendency to overly discount the future in our ethical decision-making processes.[10] They conclude that, typically, people who have an inflated sense of their own ethicality[11] decide differently based upon whether there is time to reflect on their decision before acting;[12] are unwittingly influenced by self-interested motives at the expense of others;[13] and often fail to conceive of a particular decision as evoking ethical considerations.[14]

It is difficult to glean from any specific example in the book precisely which of the multitude of psychological phenomena make up the theory of bounded ethicality. There are an abundance of individual theories and examples presented. Exactly which of these individual principles make up the authors' thesis is thereby difficult to ascertain. Nowhere in the book do the authors provide a conclusive overview of the elements of their theory. That is not to say that bounded ethicality is simply used as a catch-phrase to encapsulate numerous findings of behavioral ethics researchers. Rather, it is clear that the authors are attempting to articulate an overarching behavioral phenomenon but the lack of an explicit definition takes away little from the overall significance of the book.

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[8] *Id.* at 5.
[9] *Id*. at 7 (emphasis added).
[10] *Id.* at 43 (ordinary prejudice), 49 (egocentrism), 56 (discounting the future).
[11] *Id.* at 7.
[12] *Id.* at 66.
[13] *Id.* at 52.
[14] *Id.* at 16.

IV. Ethics Without Arguing About What Is Ethical

The authors write with the presumption that the reader has an interest in behaving ethically. While this may seem trivial (and perhaps obvious) at first, this presumption—along with the writing style and research examples that follow from it—is one of the strongest qualities of the book. Instead of spending time arguing for ethical behavior, the authors simply assert that ethical decisions are better than non-ethical decisions and move on quickly from there. *Blind Spots* successfully avoids the pitfall of trying to debate the philosophy of "what is right" and focuses very narrowly on the process of ethical decision-making rather than rallying for any particular outcome in any given case. This technique adds significantly to the clarity, purpose and focus of the book. It assists the critical reader in accepting the ideas freely, as opposed to feeling as though they are being led to ethical water and then forced to drink. The book is example-driven without being so narrowly focused on its examples as to preclude the application of the reader's imagination or personal experiences to the theories presented.

That said, it is extremely difficult to examine ethical behavior without some basis for illustrating right and wrong. The authors generally succeed in avoiding this potential quagmire by choosing examples that are commonly accepted as ethical failures. They reference the implosion of Arthur Anderson and Enron; Bernie Madoff's Ponzi Scheme; Big Tobacco's use of false advertisement; the Ford Pinto gas tank scandal; and other universally recognized ethical debacles. *Blind Spots* manages to highlight and explain ethical missteps resulting in environmental pollution, world hunger, steroid use in professional baseball, and congressional corruption without needing to be overly concerned with any potential reader disagreement. These safe and calculated subject matter choices help the authors focus on the science of behavioral ethics and avoid the book becoming bogged down in questions better suited for philosophers.

V. Some Lessons from *Blind Spots* for the Military Leader

Considering the ethical standards expected of military leaders, Chapter Four, *Why You Aren't as Ethical as You Think You Are*,[15] includes an excellent example of the type of novel insight this book

[15] *Id.* at 61.

provides. In discussing different stages in the decision-making process, the authors highlight the striking interplay between three behavioral phenomena: ethical prediction errors; the effect of hurried versus contemplative decision-making that leads to *ethical fading*;[16] and recollection bias. The authors explain the problem as follows:

> Prior to being faced with an ethical dilemma, people predict that they will make an ethical choice. When actually faced with an ethical dilemma, they make an unethical choice. Yet when reflecting back on that decision, they believe they are still ethical people. Together, this culminating set of biases leads to erroneously positive perceptions of our own ethicality. Worse yet, it prevents us from seeing the need to improve our ethicality, and so the pattern repeats itself.[17]

Presuming the reader desires to improve his own ethicality, awareness of these individual behavioral tendencies and their effect on the ethical decision-making process is highly practical. By eliminating any one of them—perhaps by ensuring time is set aside for contemplation prior to making important decisions—a military leader can avoid this dangerous cycle.

In Chapter Five, *When We Ignore Unethical Behavior*, the authors explore theories of motivation in disclosing the unethical behavior of others. Of particular interest to military leaders is the theory of motivated blindness.[18] Motivated blindness predicts that when a person is motivated out of self-preservation to turn a blind eye to someone's unethical behavior, they will fail to recognize the behavior as unethical. That is not to say they will notice the behavior and simply ignore it; the research shows they will actually not notice the behavior. Considering that the military relies heavily on its members to place internal checks on unethical behavior, this theory has broad implications for military organizations. According to this theory, those who feel as though they will face reprisal, formally or informally, will fail to notice the unethical behavior of their peers. For the commander who depends upon his

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[16] *Id.* at 71–72 (emphasis added); *see also* Ann E. Tenbrunsel & David M. Messick, *Ethical Fading: The Role of Self-Deception in Unethical Behavior*, 17 SOC. JUST. RES. 223–36 (2004).
[17] BAZERMAN & TENBRUNSEL, *supra* note 1, at 62.
[18] *Id.* at 79–86.

executive officer or judge advocate to provide ethical guideposts, this phenomenon has significant real-world implications.

VI. The Influence of the Authors

Both Bazerman and Tenbrunsel are distinguished social scientists and academics with significant experience in the field of business ethics and business culture.[19] As such, it is difficult to challenge the credibility of the science they proscribe, and they give the reader no particularly glaring reason to do so. Scientific claims tend to follow from plausible real-life examples; when a particular conclusion is formed, they cite the relevant study in the endnotes. Consistent with this practice, the authors have a website where the reader can view the references and watch a number of videos that show experiments from cited studies.[20]

Although the book focuses on ethical failures in business culture and most examples are from the corporate sphere, it is not solely intended for a business-centric audience. This focus, however, does not detract from the applicability of the authors' theories to military culture. Primarily, behavioral ethics and the theory of *bounded ethicality* rely upon the psychology of individuals. The effect of that psychology is played out when individuals engage in organizational and societal behavior. That these individuals may be business leaders or corporate employees is irrelevant to the conclusions that can be drawn and lessons to be learned by those in the military. In fact, because so much of the military is closely akin to a corporation, the lessons are generally applicable. The authors certainly appreciate the broader applicability of their conclusions and explain them accordingly. In fact, they plainly conclude that application of these theories may "contribute to creating a more ethical world."[21]

As expected, the authors write about what they know best and do not divorce their personal experiences from their conclusions. Unfortunately, this results in an entire chapter on the failure of corporate institutions—it feels awkwardly self-serving.[22] This is not surprising,

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[19] *The Authors*, BLIND SPOTS: WHY WE FAIL TO DO THE RIGHT THING AND WHAT TO DO ABOUT IT, http://www.blindspot-ethics.com (last visited Sept. 11, 2013).
[20] *Id*. at *Book Links*.
[21] BAZERMAN & TENBRUNSEL, *supra* note 1, at 170.
[22] *Id.* at 128–151 (Chapter 7).

considering the authors did propose changes to Securities and Exchange Commission regulations regarding auditor independence in 2000 that were never adopted.[23] These changes, the authors argue, would have prevented the auditing company Arthur Anderson from providing both consulting and auditing services to Enron and could have precluded the ensuing financial meltdowns and accounting scandals that pervaded that decade. It does appear that the authors were accurate in their historical predictions and they appear to have had the scientific research to back up their claims at that time. Despite this, the authors were ultimately ignored by those to whom they pleaded for intervention. The resentment over this snub is obvious to the reader and it leads Chapter Seven to feel intellectually synthetic when compared to the rest of the book. Chapter Seven presents its argument entirely from hindsight. This is awkwardly inconsistent with the otherwise intuitive approach found in the rest of the book.

VII. The Attack on Organizational Compliance Initiatives

One particular issue the authors explore is the apparent disconnect between the existence of overt and well-publicized ethical compliance initiatives in organizations that have been the source of major ethical scandals.[24] The authors take issue with traditional systems of rewards and sanctions, arguing that ethical behavior in one arena can be used as justification for unethical behavior elsewhere, and posit that informal cultures dominate ethical norms.[25] The result is that the authors have very little confidence in the ability of traditional compliance systems to effect ethical behavior. This conclusion should give pause to military leaders. Military culture is steeped in credos, mottos, slogans, and virtually unending internal "campaigns" designed to promote ethical behavior.[26] According to the authors, these efforts have little effect—if not the opposite effect—on improving the ethical behavior of

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[23] *The Challenge of Auditor Independence*, U.S. Securities and Exchange Commission: Hearing on Auditor Independence, July 26, 2000, http://www.sec.gov/rules/proposed/s71300/testimony/bazerm1.htm (last visited Sept. 11, 2013)

[24] BAZERMAN & TENBRUNSEL, *supra* note 1, at 101.

[25] *Id*. at 127.

[26] *See, e.g.*, *Center for the Army Profession and Ethic*, http://cape.army.mil/index.html (last visited Sept. 11, 2013). A review of these training materials and videos indicates that there are significant compliance initiatives underway in the Army. It is unclear whether these efforts incorporate the appropriate behavioral ethics theories or whether the authors would take issue with them.

organizations. Thankfully, the authors also use their findings to provide recommendations in each instance on how these initiatives can be better tailored to result in preferable outcomes.[27]

VIII. Conclusion

Headlines, history, and our own experiences reaffirm the authors' fundamental observation that well-intentioned people sometimes act unethically. As leaders and members of a diverse and complex organization, broadening our understanding of the science of human behavior cannot but help in our attempts to make our military culture as ethically sophisticated as possible. Overall, the book is concise, insightful, and very readable despite its scientific basis. It shies away from philosophical questions about right and wrong and focuses narrowly on presenting the findings and conclusion of two respected scientists in a way that is accessible, interesting, and surprisingly appropriate for military readers.

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[27] BAZERMAN & TENBRUNSEL, *supra* note 1, at 126.

By Order of the Secretary of the Army:

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